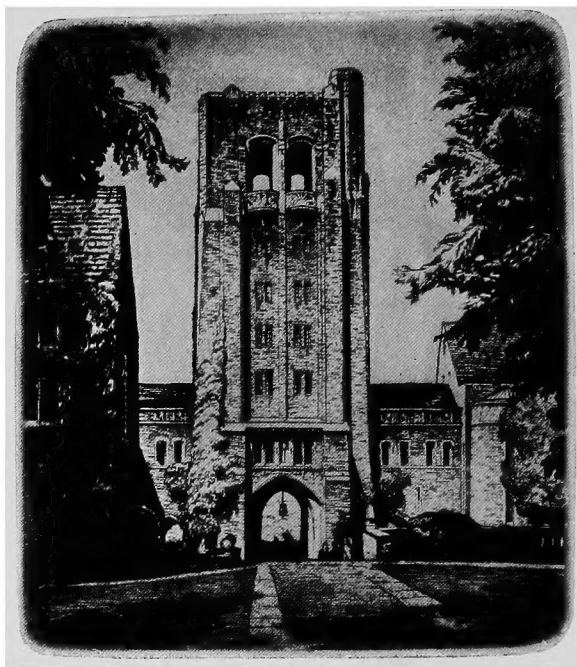


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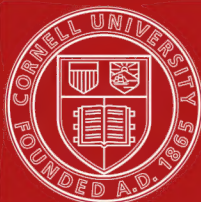
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REPORTS
OF
CASES IN ADMIRALTY,
ARGUED AND DETERMINED
IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE
SOUTHERN DISTRICT OF NEW YORK.

By ABBOTT BROTHERS.
COUNSELLORS AT LAW.

VOLUME I.

BOSTON:
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1857.

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PREFACE.

THE present volume contains a full selection of the decisions in Admiralty causes rendered in the United States District Court for the Southern District of New York, by the Hon. SAMUEL R. BETTS, from the early part of the year 1847 down to the close of 1850. It may be regarded as a continuation of the series of Admiralty Reports commenced by Blatchford & Howland, and continued by Olcott.

The present Editors have spared no pains in the effort to perform the duty which has devolved upon them ; and they have enjoyed every facility which could be desired both from the eminent Judge whose decisions are reported, and from those gentlemen in whose immediate charge are the books and papers of the District Court.

In the hope that it may be of service not only to their professional brethren practising in this District, but also to those who may labor in other fields of professional life, the volume is now submitted to the bar.

ABBOTT BROTHERS.

119 NASSAU STREET,
New York.



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CASES IN ADMIRALTY.

THE SLOOP MERCHANT.

A claim for seamen's wages and a claim for moneys advanced to the use of the ship may be united in one action against the ship.

A seaman who claims to recover both for wages and for moneys advanced to the ship's use, may join in a libel *in rem* with a co-libellant claiming wages only.

Where the vessel is liable to two libellants for wages, for which, under the practice of the Court in respect to the consolidation of suits, they may be compelled to sue in common, they may join in one action *in rem*, not only in suing for the common demands, but also in respect to other claims which are peculiar to each.

The history of the distinction between proceedings *in rem* and *in personam*, reviewed.

Where both the vessel and the master or owner are conjointly liable, the personal remedy, and the remedy against the vessel, may be sought in one and the same action.

Rule 13 of the Supreme Court interdicts the blending of an action against the owner personally, with one against the vessel, for the recovery of wages.

A claim for wages, and for moneys advanced to the use of a vessel on the part of one libellant, cannot be joined, *in an action in personam*, with a separate claim for wages alone, on the part of another.

THIS was a joint libel filed by William Johnson and Benjamin Griffiths against the sloop Merchant, *in rem*, and also *in personam*, against her master, John Kenan, and her owner, Joshua Jones, to recover wages and for moneys paid to the use of the vessel.

The libellant Griffiths, averred in the libel that he was em-

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ployed on board the sloop, running between New York and Newburg, upon a contract for wages, at \$30 per month ; and that he served ten days, for which he claimed \$10. The libellant Johnson, alleged that he was likewise employed on board the sloop at the same time ; that no specific agreement was made with him for wages ; that he served for twenty-one days, and that his services were worth \$2.25 per day and he accordingly claimed for them \$47.25. He also showed that he had made advances of cash for the use and service of the vessel, amounting to \$83.75, for which he claimed to recover. The libel prayed a decree against the vessel, and also against the master and against the owner.

The owner filed the following exceptions to the libel : —

1. That a demand for wages and a demand for moneys advanced to the use of the vessel, could not be joined in one libel ; and that at least they could not be prosecuted *in rem* and *in personam*, in one action.

2. That a suit for wages could not be maintained against the vessel, master, and owner conjointly.

3. That the demands of the two libellants could not be joined in one action *in personam* against the respondents.

The cause now came before the Court upon these exceptions.

Edwin Burr, in support of the exceptions.

Alanson Nash, opposed.

BETTS, J. The strict rules of the common law in respect to the unity of the cause of action, or the community of interest or of responsibility of parties to actions, are not observed in the maritime courts. The practice in those courts is at least as liberal and comprehensive as that pursued in equity. In Admiralty, the libel or petition is employed to present the case of the prosecutor upon which he desires the interposition of the Court in his behalf. Such a case may be composed of wrongs to the person of the prosecutor or to his property, or

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of a breach of contract, or of omission to do what he is rightfully and equitably entitled to have performed.

The libellant Johnson, can accordingly properly bring his single action in this Court, for wages earned, and materials and supplies furnished the vessel, provided he establishes a case falling within the jurisdiction of the Court; and in that respect his remedy would be the same whether he prosecuted the vessel *in rem* or the parties liable to him *in personam*.

The Admiralty adopts the rule of the civil law, respecting the cumulation of actions, (1 *Browne's Civ. & Adm. L.* 446,) to avoid multiplicity of suits.

Griffiths has not a right concurrent with Johnson in the whole subject-matter in suit, but their demands are of the *same kind*, so far as wages are concerned, the libellants having both served at the same time on board this vessel, although not for equal periods.

From this view of the subject, it follows that had these libellants commenced separate actions against the vessel for their wages, the Court, at the instance of the respondents, would have compelled a consolidation, as contemplated by the act of July 20, 1790, (1 *U. S. Stats.* 133, c. 29, § 6,) which prescribes that in this class of cases, "all the seamen or mariners (having cause of complaint of the like kind against the same ship or vessel,) shall be joined as complainants;" or, would have prohibited the recovery of costs in more than one suit; and as in such case the contestation of the claims of each libellant is separate, as much so as if those claims were prosecuted in distinct actions, there would be neither incongruity nor inconvenience in permitting the libellants to connect with their several claims of wages such other demands as each party might be allowed to charge upon the vessel; and accordingly, the actions being united for one purpose, there would be no just ground of exception that in other respects each embraced particulars which could not be of themselves the subjects of a joint suit.

Assuming that Johnson has a lien on the vessel for wages and money advanced for her necessities, and Griffiths a lien in common with him for wages only, I think no exception lies to the joinder of both demands in one libel. For the vessel being deemed liable to both for the wages, which must be sued for in common, each party may fitly pursue against her in the same action such other demands as are peculiar to himself. It is not to be supposed that Congress intended by that enactment to save vessels and owners from multiplicity of actions for wages, by interfering with and inhibiting the right of each seaman, as it exists at law, to connect other demands with his individual suit for wages.

A greater difficulty is presented by the other aspect of the first exception; whether these different demands can be prosecuted *in personam* against the respondents by joint action.

The Admiralty had an established jurisdiction *in personam* over matters falling within its cognizance, long before a remedy was afforded *in rem*, other than upon express hypothecations.

Browne supposes that suits were originally *in rem* on the instance side of the Court. 2 *Browne's Civ. & Adm. L.* 396, note. The remedy *in rem* is undoubtedly the more useful and desirable one, but there are no traces of its exercise in the English Admiralty until long after actions *in personam* had been of common use.

Godolphin, in his Treatise on the Jurisdiction of the Admiralty, published in 1661, points out the method in which the jurisdiction was exercised, as derived from the *Consolato del Mare*. He says the proceedings were summary, by warrant of arrest, and caution for the appearance of the party arrested. *Godol.* 41.

So, also, it manifestly appears in the stipulation between the law judges and judge in Admiralty, of May 15, 1575, (*Zouch's Adm. Jur.* 120,) that the arrangement of jurisdiction had relation to its exercise in the arrest of the party alone.

Throughout the first thirty chapters of the *Consolato del Mare*, which have relation to the enforcement of maritime contracts, the proceedings of the consular courts and courts of appeal are by personal summons or citation of the parties sought to be charged, and by decrees against them personally; which, like our judgments at law, could be executed upon the property of the debtor, (2 *Cons. del Mare par Boucher*, 9, 33;) and in the subsequent chapters, in which provision is made for the sale of vessels to satisfy what are now^e regarded as maritime liens, it is at^a best equivocal whether the sales were not made by force of executions on judgments or decrees first obtained in personal suits, and not by the direct condemnation of the vessels or merchandise.

So Clarke, in his Admiralty Practice, does not, as Browne intimates, merely treat first of proceedings *in personam*, but he views the process against vessels and property by warrant of arrest or sequestration, as auxiliary only to the suit *in personam*, and employed to constrain the appearance of the real party to be charged, (tit. 28, and *Oughton's Notes*,) and this was clearly so by the civil law. *Wood's Civ. L.*, b. 4, c. 3, § 2.

The method of initiating suits in the English Admiralty by arrest of the vessel, is declared to be of ancient use; (The *Dundee*, 1 *Hagg. Adm. R.* 124; 2 *Chitty, Pr.* 536;) but at what point of antiquity it became a remedy of the Court, is not traceable from the published decisions or rules. Evidently it must have been posterior to the compilation of Clarke's *Praxis* in the reign of Elizabeth, and which was first published in 1679, (*Brevoor v. The Fair American*, 1 *Pet. Adm. R.* 94,) because that form of action is not treated of by Clarke. Title 28 of his work has reference to proceedings against property to compel the appearance *in personam* of the respondent.

There is certainly no clear authority showing that actions *in rem* preceded those *in personam*, as the general means of

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exercising the jurisdiction of the Court; far less is there any to prove that the latter class of actions derived their qualities from the processes or rules of pleading employed in the former. Each form of action is distinct and independent of the other in respect to the methods of procedure employed, and (with a few exceptions) in respect to jurisdiction over the subject-matter upon which they may act.

Suits *in rem* and *in personam* are by no means convertible, and if in some instances they are concurrent, there are numerous cases in which one must be employed to the exclusion of the other. *Willard v. Dorr*, 3 *Mason*, 91; *The Ship Packet*, *Ib.* 255; *Hammond v. The Essex Fire & Marine Insurance Company*, 4 *Ib.* 196; *The Brig George*, 1 *Sumn.* 151; *The Ship Grand Turk*, 1 *Paine*, 73; *The Steamboat Orleans v. Phœbus*, 11 *Pet.* 175; *Drinkwater v. The Freight, &c., of The Spartan, Ware*, 161.

It therefore does not follow that because these libellants may, or even must join in an action for wages against a vessel, that the like rule applies when the prosecution is *in personam* alone.

These observations are intended to meet that part of the argument which regards the proceedings in this case as two separate suits, each of which is to be upheld or discharged upon principles applicable to it if prosecuted as a sole action; and they are made for the purpose of limiting the operation of the decision to the present case as it stands upon the pleadings.

The practice in this district has always sanctioned a proceeding conjointly *in rem* and *in personam* in cases where the party was entitled to the double remedy.¹ *Betts's Adm. Pr.* 20. Such it is believed is the common course of Admiralty Courts in the United States. *Abbott on Shipp.* 783, and note.

¹ See the case of the *Zenobia*, decided in this Court in July, 1847, and reported *post*, in its order of date, where this point is fully discussed.

This avoids multiplicity of suits, and saves needless repetitions of proofs and discussions, because the same facts, and between the same parties, must be in contestation in each action.

In the instance of seamen suing for wages, the same libel was allowed to pray the arrest and condemnation of the vessel, etc., etc., and process and a decree against the master and owner, to satisfy the wages in arrear.

The like result is obtained in the English Admiralty, by compelling the parties chargeable personally to come into the suit *in rem*, and give their *absolute appearance*. This subjects them and their sureties to satisfy the decree of the Court, (The *St. Johan*, 1 *Hagg. Adm. R.* 334,) and is equivalent to an arrest and decree *in personam*.

In this case, accordingly, the proceeding *in personam* is not to be regarded as an independent action, subject to the rules which would govern it in that form, but as auxiliary and concomitant to the suit *in rem* for wages, which must then be conducted in the name of both parties, and may have also the advantage of a personal decree at the same time.

But it is argued that, in this point of view, the libellants had no authority to unite the *owner and master* with the vessel; Rule 13 of the Supreme Court declaring that, "in all suits for mariners' wages, the libellants may proceed against the *ship, freight, and master*, or against the *owner and master* alone *in personam*."

Although the question of who may be responsible to a demand is one of general jurisprudence, yet the form and the arrangement of process by which the obligation is to be enforced, is matter of practice. And, according to the provisions of the act of Congress of August 23, 1842, the Supreme Court is vested with authority to impose on inferior courts an absolute law in this respect; (5 *U. S. Stats.* 518, § 6;) and the Court, under that power having proceeded to regulate this subject-matter, their regulation must be regarded

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complete and exclusive, inhibiting what it does *not* allow, as well as governing what is fixed by positive appointment. *Gibbons v. Ogden*, 1 *Wheat.* 1.

The remedy, therefore, in Admiralty, must be in conformity to the direction of the Supreme Court Rules; and Rule 13 must, I apprehend, be accepted as having determined this point, whether regarded as matter of practice or pleading, by designating the methods in which this remedy is to be pursued, and thus also excluding all others.

At least, it limits the scope of actions *in rem* and *personam* conjointly, when prosecuted for the recovery of wages, to the *vessel, freight, and master*, deferring the remedy *in personam* to a separate suit, where the owner is made a party. It is difficult to perceive the policy which induced this change of practice, or why the owner is not as aptly connected with the vessel as the master, in a proceeding involving their common liability, particularly when that of the owner is primary and coupled with an interest, whilst that of the master is only incidental to his office. That this distinction of actions is, however, considerably made, is obvious from Rules 12, 14, 15, 16 and 17, and I feel constrained to say, that suitors are by force of Rule 13 now interdicted from blending an action against the owner personally with one against the vessel, for the recovery of wages.

The second exception must, accordingly, be allowed in favor of the respondents.

The third exception is overruled. The two seamen can rightfully join in a prosecution for wages, and each is entitled to unite with his demand other claims in his behalf, being liens on the vessel. This exception is not extended to the joinder of the master and owner with the proceeding *in rem*.

The exception, however, raises the general question whether the libellants can proceed jointly against the *master* and *owner*, *in personam*, for the demands put forth by the libel.

Clearly, at common law, parties must show a common interest in the subject-matter of the suit, to be enabled to prosecute it in their joint names. It is not sufficient that their respective claims are of the same character or kind, upon contracts express or implied, liens or other liabilities; but it must furthermore appear that each plaintiff is entitled to a common share in the recovery. 1 *Chitty*, Pl. 8. The same is the case in equity, and a demurrer will lie for multifariousness for joining parties who have distinct interests. *Edw. Parties*, 10; *Story*, Eq. Pl. § 279; *Yeaton v. Lenox*, 8 *Pet.* 123. The civil law does not seem to have laid down rules in relation merely to parties uniting in an action, although it did regulate the joinder of different causes of action in one suit; usually prohibiting the union of remedies which were dissimilar in kind, (24 *Pothier*, *Pand.* 368; *Dig. lib.* 50, tit. 17, art. 431; *Wood's Civ. L.* 372,) but permitting to be embraced, in one libel, demands arising from different sources, as from personal obligation, hypothecation, &c. *Code*, lib. 7, tit. 40. Nor do I find that the practice of ecclesiastical courts made provisions specifically, respecting omitting or bringing into suits a multiplicity of parties. 2 *Chitty*, *Gen. Pr.* 481-489.

The principles and doctrines of the general law ought, accordingly, to be applied to proceedings in Admiralty, *ex contractu*, so far as they govern methods of pleading. This is clearly so, as to the essential components of a libel, plea or exception; and the convenience and usefulness of conformity, in the structure of proceedings in the different courts, is a persuasive reason for adhering to the well-defined and understood course of other courts, in the pleadings in Admiralty, and would induce the Court to be readily guided by those rules, when not infringing any principle or object of the remedies obtaining here.

In this view of the subject, I am inclined to think actions *in personam* in Admiralty *ex contractu et è diverso intuitu*,

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must be governed by the rules applicable to them in other courts in respect to the competency of parties to unite in their prosecutions, and that the present case is clearly one in which such joinder could not be allowed, if the suits had been against the respondents solely. In actions in tort, the rule is different. *The American Insurance Company v. Johnson*, MSS. 1828;¹ *The Amiable Nancy*, 1 *Paine*, C. C. R. 111; S. C. 3 *Wheat*. 546.

I do not intend in this case, to decide that the crews of sea-going vessels must sever in actions for their wages earned on a common voyage; or that parties whose rights spring out of a common cause of action must do so; but shall leave these questions to be disposed of as they may arise. But engagements for services on board river craft navigating between ports of this State, and for different periods, and at different wages, ought not to be distinguished in the modes of prosecution in this Court against parties personally, from like suits in the courts of law.

* Questions have been raised and argued, upon the import and effect of the Supreme Court Rules 12, 14, 15, 16 and 17; but, as they do not bear upon the points now decided further than has been already noticed, I shall forbear any remark upon them, other than to say that a remedy for supplies or materials furnished the vessel cannot be had against the master *and* owner, in connection with the vessel, but only against one of them. *Rule 12*.

The decision of the Court upon the exceptions is:—

1. That these libellants cannot maintain a joint action, *in personam*, solely upon the matter set forth in the libel.

2. That the libel is maintainable against the vessel *in rem*, in behalf of both parties, and that a decree may be taken for wages against both the vessel and *master*.

¹ Since reported, 1 *Blatchf. & H. Adm. R.* 9.

The Isaac Newton.

3. That no recovery or decree can be had in this form of the action against the *owner*.

4. That Johnson can have a decree for supplies, &c., against the vessel, and against either the master or owner at his election, but not against both.

Decree to be entered accordingly.

THE ISAAC NEWTON.

To entitle the claimant or respondent,⁴ in Admiralty, to claim judgment against the libellant preliminarily, on the ground that his right of action did not mature until after the suit was commenced, the objection must be raised by plea in abatement or demurrer.

And where such plea has not been interposed, the Court will not pronounce against the action merely on the ground that it was prematurely brought, if the right of action is perfected before the final hearing.

In such cases parties will be protected, in the adjustment of costs, from any injustice arising from a too early commencement of the suit.

Where the owner of property places it in the hands of another person, solely that the latter may make repairs, improvements, additions, &c., to it, and afterwards demands and receives the redelivery of it, this is not an admission on the part of such owner that the services agreed for have been performed, nor does it estop him from contesting the fact of the fulfilment of the agreement.

It seems, however, that such acceptance of the redelivery of the property may be regarded at law as an admission that the owner has received some benefit, and that the other contracting party is entitled to some remuneration for the work done.

The libellants, manufacturers of steam-engines, had contracted with the claimants to build for a boat owned by the latter, a steam-engine, with the main cylinder eighty inches diameter of bore, and twelve feet stroke of piston, of the best materials and workmanship, and of sufficient and suitable size and strength in all its parts, and to include all modern improvements; the boilers to be of the best Pennsylvania wrought iron, and of the most approved construction for generating steam with economy of fuel, and of size to supply the cylinder with steam at as many pounds pressure to the square inch on the piston, when working with the throttle wide open, as are used by the fastest steamboats on the Hudson River when going at their greatest speed.

Held, upon this agreement and upon the evidence in the cause, that the intention of the parties was that the boilers should be so constructed as to furnish the en-

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gine with at least forty pounds pressure of steam to the square inch on the piston (or boiler) when working with the throttle valve wide open, using such length of cut-off to the piston as was customary with the class of boats referred to.

Where, by the terms of a contract for the construction of a steam-engine, in a boat owned by the employing party, the consideration-money was to be paid by instalments as the work advanced, so that a large portion of it would be payable before the time for the full performance of the contract :—*Held*, that the perfect fulfilment of the agreement by the party employed was not a condition precedent to the obligation of it upon the employer ; nor could the latter take possession again of the boat without compensating the former for the benefit actually received, although the work was not done in entire conformity with the specifications.

Where, by the terms of a contract for building a steam-engine, the work was to be done under the superintendence of the employers, and to be paid for in instalments as it proceeded, and was to be finished at a specified time ; and the work was protracted beyond that time, but the employers continued their superintendence, and made payments on account thereafter :—*Held*, that by so doing they acquiesced in the delay and estopped themselves from claiming damage therefor.

Where a contract between the owners of a steamboat and other parties for the erection of a steam-engine in the boat, provided that the builders should test and prove the work, when completed, in a certain way ; and before they had so tested and proved it, the owners of the boat took possession of her, and commenced running her, and the builders thereupon commenced an action without ever having applied the stipulated tests :—*Held*, that the action was not prematurely brought ; as the owners, by taking possession of the boat as their own, must be regarded as having admitted their liability to pay whatever was justly due for the work actually performed.

• **THIS** was a libel *in rem* by “The Allaire Works,” a corporation created under the laws of the State of New York, against the steamboat Isaac Newton, to recover for an engine, &c., supplied to that boat.

The libel, after setting forth the corporate character of the libellant, averred the following facts :—

That on or shortly after November 1, 1845, the libellant, by an instrument in writing, bearing date as of that day, agreed with Daniel Drew, Elijah Peck, and Isaac Newton, of the city of New York, to build for them and to set up, complete and ready for use, in a boat then building by William H. Brown, a shipwright carrying on business in New York, a

low-pressure beam steam-engine, with the main cylinder eighty^{two} inches diameter of bore and twelve feet stroke of piston, of the best materials and workmanship, and of sufficient and suitable size and strength in all its parts, and to include all modern improvements; the engine to be secured in the boat in the best and strongest manner, and in all respects as an engine of such unusual power required for its firmness, security and permanency; its shafts and cranks to be of the best wrought iron; the steam pipes, copper; copper to be substituted for iron where it could be done to the advantage of the engine in lightness and durability; the general appearance to be improved by as much bright work as good taste might dictate; the whole workmanship to be such as would be creditable to the builders and owners; the boilers to be of the best Pennsylvania wrought iron, and of the most approved construction for generating steam with economy of fuel, and of a size to supply the cylinder with steam at as many pounds pressure to the square inch on the piston, when working with the throttle wide open, as were used by the fastest steamboats on the Hudson River when going at their highest rate of speed, together with blowers and blowing engines complete; the engine to be furnished with all necessary tools, fixtures, and bells, and to be put into successful operation under the superintendence and to the satisfaction of Isaac Newton. And it was further agreed that the libellant should thoroughly try and prove the engine and boilers with as much pressure of steam on each square inch of the piston as was customary in the fastest boats upon the Hudson River when going at their fullest rate of speed; and if any part of the engine or boilers, or their appurtenances, should prove to be weak or defective, they were to substitute for the same, others of more suitable material or construction, so that the whole should be perfect in every part; and the engine, with its boilers and appurtenances, was to be

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completed and put to trial and proof on or before the fifteenth day of May then next.

The libel further alleged that Drew, Peck, and Newton, by the contract above mentioned, agreed on their part to pay to the libellants the sum of forty-six thousand dollars, in four equal payments, as the work progressed; the last payment to be made when the engine, and all things appertaining thereto, were completed, tested, approved, and accepted by Drew, Peck, and Newton.

The libel further alleged that the libellants proceeded to build, and made ready for use in the steamboat referred to in the contract, a steam-engine, conforming to the specifications of the agreement. That the engine, with all necessary tools, fixtures, and bells, was completed, and put into successful operation and motion under the superintendence of Isaac Newton; that the engine, with the boilers, blowers, and blowing engines complete, of the description, quality, and particulars mentioned in the agreement aforesaid, had been completed and thoroughly tested, tried, and proved in the manner required by, and according to the terms of the said agreement, and the same, with all their appurtenances, had been accepted by the said Drew, Peck, and Newton, who had commenced running the steamboat as a passage-boat between New York and Albany; and that Isaac Newton had expressed his approval of the engine, boilers, and appurtenances.

The libel further averred that the other contracting parties had not paid for the work according to their agreement, but that there remained due to them, including charges for extra work, the sum of \$13,636.47; that extra work not required by the agreement had been put upon the boat, which, with materials furnished therefor, amounted to the sum of \$6,630.47, which had not been paid to the libellants; and that the steamboat, with all her appurtenances, was now in the possession of the other contracting parties.

The libel prayed an attachment against the boat and her

appurtenances, and that all claimants might be cited to appear and answer, without oath, and that the Court would pronounce for the libellants for the balance claimed, and for such damages as shall be deemed proper, &c.

To the libel was annexed a copy of the contract, from which it appeared that a very similar agreement had previously been made by Drew, Peck, and Newton, with John Taylor and Curtis Peck, in whose place the libellants had been afterwards substituted. There was also annexed a statement of the amount of work done by the libellants, with a bill of particulars of the extra work; the whole of which amounted to \$48,630.47. A credit was given upon the account for various payments, amounting to \$35,000, leaving due to the libellants the balance claimed in the libel.

The claimants, Drew, Peck, and Newton, filed their claim and answer, November 11, 1846. The answer admitted the contract set forth in the libel, but denied that the libellants performed the contract according to its true intent and meaning, as alleged in the libel, (specifying various particulars in which the libellants had failed to perform, and negating the fulfilment of the affirmative stipulations on the libellants' part,) and denied, in general, that the engine, with all pumps, tools, fixtures, and bells, were, at the time of filing said libel, completed, and put into successful operation and motion in the manner required by the contract, under the superintendence of Isaac Newton, or to his satisfaction; or that the engine, with its boilers, had been thoroughly tried and proved by libellants, according to the contract. And it was averred that a sufficient time had not been allowed the claimants before filing the libel, to try and prove the engine and boilers, according to the contract; and that such trial could not be made, because of the insufficiency of the boilers to generate the steam requisite thereto. The answer further alleged that the claimants, having been from May 15 to October 8, 1846, delayed by the failure of the libellants to complete the con-

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tract, they, on the last-mentioned day, commenced running the boat, as a passage-boat, between New York and Albany, "subject to be completed and furnished and finished by the libellants, in all things according to the contract, and without any waiver of the conditions thereof, or of the damages to which they were entitled;" and it alleged that after the boat commenced running, and two weeks after the libel was filed, a number of men were employed and worked on the boat under the directions of the libellants, completing the same.

The answer further alleged that payments had already been made equal to and beyond the full right of the libellants; denied that the claimants ever paid moneys on the charges for extra work, or ever acknowledged that libellants had any claim therefor; and the answer denied their right to the same, and denied that any extra work was performed beyond a small item, amounting to about \$200, and denied the right of libellants to charge even for that as an addition to the contract price.

The answer further claimed a credit of \$667.37, for coal furnished the libellants in July, 1840; and claimed other sums paid by them for fixtures, &c., to the boat, which the libellants ought to have supplied; and denied that \$13,630.40, or any part of it, was due the libellants, or that the libellants had any lien on the boat when the libel was filed.

Upon this statement of facts the claimants demanded damages to the sum of \$30,000, for being deprived of the boat at the time contracted for, and because of charges and disbursements paid for her safe-keeping in and during the period between May 15 and October 8.

The cause now came before the Court upon the proofs, the entire hearing occupying seventeen days.

Francis B. Cutting and *Daniel Lord*, for the libellants.

C. Van Santvoordt and *Henry E. Dodge*, for the claimants.

BETTS, J. Before considering the merits of the case between the parties, it is proper to dispose of two preliminary objections interposed; the one by the claimants to the maintenance of the action, the other by the libellants to the right of the claimants to offer the defence raised by them.

The claimants insist that by the contract the last instalment did not become payable until after the engine, boilers, &c., were completed, tried, proved, and accepted; that no acceptance of the work as conforming to the agreement has been made up to this time; and that the suit was instituted two days after the boat was delivered to the claimants, without the preliminary trial and proof stipulated in the contract.

Upon this objection it is first to be remarked, that the facts upon which it rests compose an essential feature in the merits of the case. The libellants ground their action upon the allegation that they have fully performed the contract on their part, and they now insist that they have established the allegation by the proofs. Evidence has been given at great length on both sides upon this point, and the claimants contend that the weight of it maintains their defence in this behalf. The question thus becomes one vital to the case. Upon the merits, involving the fact of performance as well as the time of performance, and no Court will turn one party round on a mere technical point, embraced within the merits, if the essential rights of both can be preserved by retaining the cause to final judgment.

In the second place, it is to be observed, that in courts proceeding according to the course of the civil law, there is less reason for rigor in the rule that the right of action must be complete when the suit is commenced, than in common-law courts; because in the former the matter of costs being wholly in the discretion of the Court, it can protect the party prematurely sued, by allowing him costs, without the necessity of dismissing the cause for that purpose, as must be done in

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common-law actions. If the cause of action is matured when the answer comes in, or even at the time of trial, there is no necessity for ordering the suit to be brought *de novo*; but the Court can retain and proceed with it, adjusting the rights of the parties according to their respective equities. The pleadings in the civil law accordingly give to the objection that the demand sued upon is not due, the effect of a *dilatory* exception only, (*Wood's Civil Law*, 386,) whilst *peremptory* exceptions, payment, release, duress, &c., bar and exclude the action forever. *Code Civil*, La. 125.

Such, also, is the function of exceptions in the canon law, from which the Admiralty practice was very directly derived. *Clarke's Ecc. Pr.* § 32; *Cockburn's Clerks' Asst.* c. 6; *Clarke's Adm. Pr.* tit. 46. At most, when the exception touches the form of proceeding, (which may, perhaps, include the liability of the defendant to answer the demand *eo instanti*,) the prosecuting party may at once renew his suit, on rectifying the objectionable act, and paying costs. 13 *Pothier*, 12; *Pand. Civ.* c. 2, art. 2, § 3.

In this Court the answer is permitted to avail as a special plea or exception other than to matters of *abatement*, (*Dist. Ct. Rule* 76,) and both by the rules of this Court and the higher authority of the Supreme Court, amendments are allowed in every stage of the proceedings upon the most liberal terms. *Betts's Adm. Pr.* 57; *Sup. Ct. Rule* 24; *Benedict's Adm. Pr.* § 483. It is doubtful, under these regulations, whether matters of abatement can be set up at all by answer; but if it can, the Court, under the authority of these rules, as well as under the broad provisions of the Judiciary Act, (1 *U. S. Stats.* 91, § 32,) may give the party relief at discretion, without compelling him to bring a new action.

To be entitled to claim judgment against the libellants preliminarily, for want of a matured right of action when the suit was commenced, the claimants must have pleaded in abatement or demurred; and by presenting the point on the final

hearing upon the merits, it must be regarded as entering into and composing a part of the defence on the merits.

This defence, if formally interposed in equity, would be either a plea in abatement, (*Beames's Pleas*, 58, 60,) or a plea to the bill. *Ib.* 61. This subject is largely considered by Judge Story, and he holds that the defence proper to be offered under these pleas is not generally available by way of answer, or at the hearing; and, therefore, the objection ought to be taken *ante litem contestatam*. *Story, Eq. Pl.* § 708.

The Court will not, accordingly, now pronounce, in exclusion of a consideration of the merits, that the libellant had no existing cause of action when his suit was instituted.

Neither, in my judgment, can the objection raised in this stage of the case to the admission of the claimants' defence prevail. The libellants are not entitled to preclude a full investigation of their own demand, or of the merits of the defence.

By taking the boat into their possession on the 8th of October, and appropriating the machinery supplied by the libellants to their own use, the claimants do not adopt the delivery of the boat as a performance of the contract on the part of the libellants, and are in no way *estopped* from controverting the fact of the fulfilment of the agreement. If the rule be otherwise in respect to articles manufactured by one for another, it cannot govern the case where the work done is applied to property owned by the one obtaining the work, and not by him who does it, and which exceeds in value the alteration or improvement put upon it by the mechanic, nor to contracts executory in their character relating to personal property. *Allaire v. Whitney*, 1 *Hill*, 484; S. C. 4 *Denio*, 554; S. C. 1 *Comst.* 305. The claimants in this case being the owners of the body of the boat, of itself of great value; and the undertaking of the libellants being to complete it by adding a steam-engine and machinery of the description specified in

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the agreement, and the boat never being out of their possession, or in that of the libellants, except for that purpose, the claimants had a right to demand and receive the re-delivery of the boat at the time stipulated, or at any time subsequent, without having their acts in so doing operate as an admission that the libellants had fulfilled their contract, or as a discharge of them from its obligation. This may be regarded at law as an admission that they have received some benefit, and that the libellants are entitled to some remuneration for the work done. *Lucas v. Godwin*, 3 *Bing.* 737; S. C. 32 *Eng. C. L. R.* 309. But it will not operate as an acknowledgment that the contract has been performed to their satisfaction.

In the present stage of the cause it is intended to discuss two questions only:

1. Whether the agreement has been performed by the libellants according to its true import and meaning?
2. If it has not, what rule of compensation should be adopted towards them, and in protection of the rights of the claimants?

The libellants have received in cash payments made at different periods during the progress of the work, the sum of \$35,000. The contract price for which the work specified was to be done, was \$46,000, and they claim, in addition, \$2,630.47 for work and materials put upon the boat, extra the stipulations of the contract. The claimants claim disbursements and payments in addition to those credited by the libellants, and insist they are entitled to damages to the amount of \$30,000, for the delay of the work and detention of the boat from May 15 to October 8, and also because of the imperfect and insufficient performance of the contract in the work done by the libellants.

The first point of difference between the parties, necessary to be disposed of by the Court, is the meaning and extent of the contract in respect to the questions in dispute.

Although, as might be expected, in a controversy involving

so large a demand, the parties have litigated with earnestness every question which the case can fairly raise, yet, in my judgment, the essential matter in dispute relates to the *boilers*, and whether they fulfil the engagements of the contract respecting them. But before taking up this main feature of the case, it will be proper to dispose of one or two other points, upon which a great detail of testimony has been given, not always of the most harmonious character, and which has also been very closely examined and criticized upon the argument.

In respect to the engine and appurtenances, the agreement stipulates various particulars, which the claimants insist the libellants have failed to perform. The libel avers a full performance, except as to time. The deficiencies specified relate to the securing the engine, furnishing the necessary tools, implements and bells, and securing the water-wheels by sufficient iron rims or braces around their circumferences. It is also insisted for the claimants, that various particulars, charged by the libellants in their account as extra work and materials, fall within the meaning of the contract, and are compensated for in the consideration agreed upon for the entire work. Most of these particulars are proper subjects for examination by experts, and under circumstances giving an opportunity for a more thorough understanding of the facts applicable to the subjects than can be possessed by the Court itself. They will accordingly be submitted to the consideration of assessors in the reference that will ultimately be directed in the cause.

The evidence in respect to one of these incidental topics is, however, so fully before the Court, that it will be disposed of without compelling the parties to go before referees with further testimony on that subject. I refer to the claim of the libellants for extra allowance for fastening the gallows-frame. This is, no doubt, an appurtenance most essential to the well-working and security of the engine, and in that sense might,

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perhaps, fall within the scope of the agreement. But the preponderance of evidence is clear, that the known usage of steam-engine builders and boat builders, is to regard the frame as a portion of the boat itself, to be fastened when put up by the builder; and if the owner desires to have the skill and experience of the engineer employed, in fastening it more completely, when fitting in the engine, he must secure that service by stipulations in the contract. If this usage is not sufficient of itself to control the construction of the present agreement, the declaration and stand taken by the libellants before the work was put in the boat, evince that it was well understood between the parties that the libellants would not perform that work as part of their contract, and by requesting them to do it after that explicit notification, the claimants must be held to have acquiesced in that interpretation.

This brings us to the great point of controversy between the parties, viz.: whether the boilers put in the boat are of the capacity and construction demanded by the contract?

The objection made to them by the claimants is that they are not of the most approved construction for generating steam with economy of fuel, and that they were not so built as to supply to the cylinder the quantity of steam stipulated by the contract. The libellants deny that the claimants have put the true construction upon the agreement, and insist it has been fulfilled according to its import and intent, and that as to the quantity of steam to be supplied, the contract only entitles the claimants to the amount named, when the cut-off is so arranged upon the engine that the boilers will supply it with the piston raised or depressed at a reasonable working distance from the heads of the cylinder; the after action of the piston to be effected by the expansion of the steam so introduced.

The piston has a stroke of twelve feet. It is very clearly proved that if the cut-off is arranged at six feet, or five feet, these boilers cannot be made to supply the engine with steam

beyond a pressure of about fifteen pounds to the square inch, when in full action with the throttle-valve wide open. Experienced engineers, on the other hand, state, and this agrees with the theories of books of science, that if the cut-off is protracted so as to diminish sufficiently the aperture between the piston and the heads of the cylinder, the amount of steam generated by boilers of the capacity of these, would furnish forty pounds pressure to the square inch upon the piston, being the head or force claimed by the claimants. The measure of the stroke of the piston at which the valve should close so as to preserve the head of steam required and the full action of the engine, is not proved. This theory rests upon a reason obvious enough, even to those unskilled in the art. An instantaneous jet, with the throttle-valve to this engine opened wide, would furnish steam enough to fill a narrow vacuum, and yet diminish the force still acting within the boiler so little as to leave the gauge standing at nearly its highest point. In proportion as the quantity is abstracted from the boiler will be the rate of pressure there, unless the apparatus for generating steam is such as to renew the supply with extreme rapidity. It is manifest, therefore, that a steady use of steam from the boiler, through a discharge-valve of the capacity of this throttle, would require, in order to maintain a pressure of forty pounds to the inch, an average pressure at command greatly exceeding that amount, or that steam should be evolved by the boilers as rapidly as it is used by the engine.

There is evidence furnished by the libellants from engineers of learning, and from scientific treatises on the use of steam, conducing to prove that the modern and improved method of working steam-engines is, to fill the cylinder partially with steam from the boilers, depending then on its expansive action, as thus the force it continues to exert in expansion is so much saved in the consumption of steam. And various experiments with engines, particularly stationary ones, have

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been referred to as demonstrating that in this mode of employing steam there is not only economy of fuel secured, but an actual increase of power. The argument deduced from this evidence is, that the libellants were bound to construct boilers only with a view to their use in this manner, and not to have them capable of filling one half or more of the engine with steam, at the pressure indicated by the contract. This point, however, must be determined by the meaning of the contract. Should it fail to supply the means of a clear and satisfactory interpretation within itself, then, undoubtedly, extraneous considerations may be brought to bear to point out and determine the true intention of the parties.

The claimants, as appears by the contract, came in as substitutes of parties who had a previous agreement with the libellants to build an engine for this very boat, then in course of construction at William H. Brown's ship-yard. The cylinder, by the first agreement, was to be seventy-two inches in diameter, and the piston to have eleven feet stroke, and the compensation to be paid the libellants was \$37,500. That agreement was abrogated by the present one, and an engine of greater force, at an increased rate of compensation, was stipulated to be built. The cylinder was to be "eighty inches diameter of bore and twelve feet stroke of piston, of the best materials and workmanship, and of sufficient and suitable size and strength in all its parts, and to include all modern improvements; the engine to be secured in the boat in the best and strongest manner, and in all respects as an engine of such unusual power and capacity requires, for its firmness, security, and permanency."

It is to be remarked upon these stipulations that the claimants do not exact an agreement to fit up the engine so as to enable them to work it conformably to "*all modern improvements*," but so to build it as "*to include all modern improvements*." This phraseology, in its connection as well as natural import, evidently looks to such construction of the

cylinder with the apparatus as should be necessary to its operation, and not to the manner by which it was to be operated. The engine to be built was one of power and capacity untried by any river boat. The plain purpose of the agreement, signified in this language, was to have this engine of such strength in itself and its parts, and so stably and firmly secured, that this immense new power which its capacity would furnish, could be safely used in running the boat. The agreement in itself shows that the parties had in view the engines of the *fastest boats* then running on the North River, and that the dimensions of this cylinder and the other branches of the engine were projected with intent to acquire on this occasion a power to be put in use, surpassing theirs in proportion to the difference of cylinders.

The libellants contend that the agreement required of them no more than to secure to the claimants a command of steam which would enable the engine to be worked at the high power indicated, "*according to modern improvements*;" that is, by injecting the force or head of steam indicated, and then having the cut-off so arranged as to work the engine by the expansive force of the steam; or at most, that the engine of the Isaac Newton was to be supplied with steam, not to the same actual amount as that used by the fastest river boats, but only proportionately to the relative sizes of the engines; and thus a computation is made by some of the witnesses tending to show that, upon the principles of that proportion, twenty-five inches of steam in the cylinder of the Isaac Newton, with a cut-off at six and a half feet, is equivalent to thirty-seven inches in the cylinder of the Hendrick Hudson, as that boat is usually run with her cut-off at five and a half feet.

The language of the contract is this: "The boilers to be of the best Pennsylvania wrought iron, and of the most approved construction for generating steam with economy of fuel, and of a size to supply the cylinder with steam at as many pounds.

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pressure to the square inch on the piston, when working with the throttle wide open, as are used by the fastest steamboats on the Hudson River when going at their highest rate of speed."

If any implication of a proportion to be maintained between the engine of the Isaac Newton and the Hudson River boats is contained in this stipulation, it clearly is, that the proportion between the cylinder and boilers of the Isaac Newton shall be correspondent to that in the fastest boats, between the same parts of their engines. That proportion is not measured by dimensions, but by the result of the coöperation of the respective parts,—the amount of pressure upon the square inch whilst the boat is at her highest speed, and using a full head of steam up to half the capacity of the cylinder. This, it seems to me, furnishes a plain key to what the parties contemplated in this agreement.

The notion evidently was, that important advantages would be secured by having this cylinder augmented to an extraordinary power and worked at its highest capacity. The parties have fixed with precision its length and diameter,—eighty inches diameter in the bore, and twelve feet stroke of the piston,—and they engage boilers to be furnished of a size to supply the cylinder with as many pounds pressure on the square inch on the piston, when working with the throttle wide open, as are used by the fastest steamboats on the Hudson River, &c., &c. It is to be assumed that the parties well understood between themselves what the facts were in respect to the steamboats to which reference was made, and that such reference communicated to them a clear and precise idea of the extent of the engagement. This presumption is made indubitably certain by the proofs. The libellants were manufacturers of engines for boats of that description, and the claimants owned boats falling within the class. The purport of the agreement would thus seem scarcely to admit of doubt. It denotes distinctly the intention to give the Isaac

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Newton the same measure of power upon her engine which these boats have on theirs at their full and greatest speed. The evidence shows that power to be full forty pounds pressure to the square inch, and in some instances exceeding fifty pounds. The boats chiefly referred as falling, without dispute, within the class of fastest steamboats then running on the Hudson River, are the South America, the Hendrick Hudson, the Mountaineer, (in all which the claimants were part or full owners,) the Niagara, the Thomas Powell and the Oregon; and perhaps the St. Nicholas, the North America, &c., should be ranked amongst them also. With some variety of statements, the witnesses generally agree that the South America used from thirty-three to forty-five pounds steam; the Hendrick Hudson, thirty-eight to forty-five pounds; the Thomas Powell, from forty-five to fifty pounds; the Oregon, from thirty-eight to forty; the Niagara, St. Nicholas, and North America, were also shown to carry about forty pounds of steam, all when running with their throttle-valves wide open.

The boats referred to usually had their cut-off half the length of the piston. The Thomas Powell used hers, at times, at eight feet, carrying fifty pounds steam. The stroke of the piston was eleven feet, and the diameter of the cylinder forty-eight inches. The Hendrick Hudson had also an eleven feet stroke, and her cut-off was arranged at about half way.

Both upon the language of the contract and in view of the concomitant facts embraced within the reference made to the other boats upon the river, it was, in my opinion, the intention of the parties that the boilers should be so constructed as to furnish the engine with at least forty pounds pressure of steam to the square inch on the piston, (or boilers,) with the throttle-valves wide open, using such length of cut-off to the piston as was customary with those other boats.

But the testimony is clear that no such amount of steam could be obtained from these boilers. In truth it was with

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great difficulty that that head of steam could be raised when the engine was at rest, and when in motion, it could not be maintained above twenty-five inches of pressure, with the throttle-valve only about one quarter open. When open to its full width, the steam, with all the power of the blowers attached to the engine, could not be kept above fifteen to eighteen pounds of pressure.

It is urged for the libellants that blowers of an improved character would have been furnished, but the agent of the claimants preferred those which were put in; when, with the use of such other blowers, the head of steam required could have been readily generated in those boilers. I do not feel competent to decide, to my own satisfaction, to what cause the deficiency of the boilers is to be ascribed. Various defects in their construction have been supposed, particularly in the back connections; so, also, as to the thickness of the iron, the steam chimney and jacket; and it may well be that the blowers contributed in some measure to the general inadequacy of the boilers to accomplish what they were expected to do. I do not undertake to determine, upon the knowledge of the facts communicated by the testimony, whether it is necessary to enlarge the circumference or length of the boilers, or to change their interior construction. There may be other mechanical means adequate, through other alterations of the engine and apparatus, to secure the result called for by the contract. It is plain to my mind, however, that the claimants have not obtained the head and power of steam contracted for, and that they have sustained injury by the failure; and the decree in the cause will adopt proper measures to enable the Court to appreciate more satisfactorily the extent of that damage, and probably the causes or deficiencies occasioning it, and the manner by which it may be remedied.

The water-wheels are appurtenances to the engine, and were, as part thereof, to be built and secured in the best man-

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ner. On trial they were found insufficient to support the power of the engine, and the clear weight of the evidence is, that the inadequacy arose from the want of iron rims upon the circumferences to support and strengthen the arms in their action. This is, it appears, an improvement of common use, and the claimants were entitled to have it applied to these wheels.

The contract was not completed within the time stipulated. The libellants engaged to deliver the work complete on the 15th of May, and did not offer a delivery of it till the 8th of October thereafter.

Had the claimants refused to accept the work at that time, and this action been brought upon the refusal, and to enforce the contract against them, there would be ground for the claim that all reasonable damages incurred by such delay, should be secured to the claimants, before they could be compelled to fulfil the stipulations on their part. It might not stand on the footing of a contract rescinded as to the claimants, by occasion of non-performance on the part of the libellants, as, under the characteristics of this contract, the perfect performance by the latter of their engagement was not a condition precedent to the obligation of the former. The agreements, to a certain extent, were concurrent and independent, so that a very large proportion of the consideration-money, payable by the claimants, was to have been received by the libellants anterior to the period fixed for the full performance of the terms of the contract.

Besides, the work of the libellants was to be put upon a boat owned by the claimants; and the remedy of the latter would not be by an abrogation of the contract, for that would leave neither themselves nor the other party in the same position as if an entire failure to perform had occurred. The claimants could not repossess themselves of the body of the boat, without compensating the libellants for the work bestowed upon her: nor could the latter retain her, without

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allowing the former all damages because of the insufficient performance of the agreement. When, therefore, the boat was received by the claimants, such acceptance, in the manner in which it was made, did not admit a performance of the contract by the libellants, nor in any way release or relieve them from their responsibility for an imperfect performance. Still, the claimants, by continuing their superintendence of the work as it progressed, and by paying instalments after the 15th of May, must be regarded as having so far acquiesced in the delay of performance as not to be now able to put forward that delay as a substantive ground of damages. They are justly entitled to remuneration for any expenses or disbursements incurred in consequence of the prolongation of the work by the libellants, and their claim to damages on this head must be limited to these particulars.

In so far as the execution of the contract is short of the agreement, there is no difficulty in giving the claimants a proper indemnity, by subtraction from the balance yet unpaid, or by way of recoupment, upon the amount otherwise recoverable by the libellants. *Barber v. Rose*, 5 *Hill*, 76, and cases there cited. Although the engine, at the commencement of this suit, had not been tested and proved according to the provisions of the contract, and had not been then completed and put into successful operation by the libellants to the satisfaction of Isaac Newton, as stipulated in the contract, but various and important particulars still remained to be done; and although the claimants had not accepted the engine and appurtenances as a true performance of the contract on the part of the libellants, yet the claimants having taken the boat with her engine and appurtenances, into their employment, and having since retained it and kept it running upon the North River, they must be held to have thereby admitted their liability to pay the libellants whatever was due them (after reasonable allowances for defective performance of the contract,) for the machinery put into the boat.

In that point of view the action is not prematurely brought. If the claimants intended to put themselves upon their strict rights in this respect, it would have been necessary for them to have declined receiving the delivery of the engine until it had been tested and proved by the libellants, according to the agreement. *Perkins v. Hart*, 11 *Wheat.* 237.

After taking it into their own possession as their property, and continuing to hold and use it as such, they cannot controvert the right of the libellants to be paid the value of the work. *Linningdale v. Livingston*, 10 *Johns.* 36. The principle of this decision, as subsequently expounded by the Court, supposes a performance of the contract with variations from the agreement, probably with the assent of both parties, or an extension of the time within which the agreement was to be performed, with the like assent. *Jackson v. Rosevelt*, 13 *Johns.* 97.

In the delivery and completion of the boat and machinery, both parties manifestly acted under the idea that the contract was to regulate their respective rights; the libellants placing themselves upon the assertion of a complete performance in every thing, except as to time, and the claimants invoking the agreement as ground for the remuneration they demand because of a defective performance.

In this Court it matters not whether the remedy be on the agreement, or the agreement be revoked, and the remedy rests on a *quantum meruit* or *quantum valebat*. The form of proceeding and pleading is substantially the same, and accordingly the distinction adverted to or marked with strict emphasis in cases at common law, touching the form of action upon rights so circumstanced, has no application or authority in maritime cases prosecuted in Admiralty. *Jackson v. Rosevelt*, 13 *Johns.* 97; *Barber v. Rose*, 5 *Hill*, 76. The libellants may accordingly retain and pursue their action as instituted, and the claimants will be allowed, against any balance established against the boat, a just recompense for imperfect per-

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formance, and damages and expenses, to which they have been subjected in consequence of the prolongation of the work.

The question of interest and costs will be reserved until the final hearing upon the report of auditors or assessors, to be provided for by the decree.

The following decree to be entered will point out specifically the method by which the objects which have been specified are to be obtained.

In view of the pleadings and proofs in this cause, it is considered by the Court:—

That the defence set up on the part of the claimants that the contract in the pleadings set forth was not performed and fulfilled by the libellants within the time therein stipulated, is no bar to a right of action thereupon.

That the claimants being owners of the said steamboat Isaac Newton, their demand of her delivery from the libellants, and their acceptance of her when delivered, was no acceptance of the engine and boilers put in the boat by the libellants, as being constructed and completed pursuant to the contract aforesaid; and the claimants are no way thereby precluded from the defence, that the contract has not been performed by the libellants according to its true intent and meaning, or from claiming a just recompense in case a non-performance or imperfect performance thereof is proved.

And in view of the allegations of the libel, and the proofs of the parties, and the import and effect of the said contract between them, it is found by the Court:—

1. That the engine, with its appurtenances, fastenings, and materials, (except the boilers and bracings of the water-wheels to be specially noticed in this decree,) was made and completed by the libellants in every particular, equal to what was stipulated and required in that respect by the said contract.

2. That the boilers built and furnished the said boat by the libellants were not of the most approved construction for gen-

erating steam with economy of fuel, according to the engagements of the contract; but on the contrary, did not include all the modern and well-known improvements in that behalf, and were so constructed as to require and consume an amount of fuel much greater than is used in boilers of approved construction, with such modern improvements, to generate an equal amount or proportion of steam.

3. That the said boilers were not so constructed and built as to supply the cylinder with as many pounds pressure of steam to the square inch on the piston, when working with the throttle wide open, as are used by the fastest steamboats on the Hudson River when going at their full and greatest speed, according to the engagement of the said contract; but on the contrary, whilst the boats so referred to, when so running, use forty pounds and upwards of steam to such square inch, the engine of the Isaac Newton is supplied by these boilers, when the throttle is wide open, with not more than a pressure of fifteen pounds of steam to the square inch on the piston.

4. That the engine and boilers of said boat were not tried and proved by the libellants or others previous to the commencement of this action, or afterwards, with as much pressure of steam on each square inch of the piston as is usual or customary on boats on the Hudson River, when going at their greatest, fullest, and highest speed, according to the agreement aforesaid; but on the contrary, whilst the boats so referred to and so going, had and used for their usual and customary pressure of steam, forty pounds and upwards to the square inch on their pistons, the engine and boilers to this boat were not and could not be so tried and proved with a pressure of steam as aforesaid, exceeding twenty-seven, or thirty pounds at the utmost, to the square inch on the piston.

5. That the engine in the said agreement of the libellants engaged to be built, had not, at the commencement of this suit, been completed and put into successful operation and

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motion, under the superintendence and to the satisfaction of Isaac Newton, as stipulated in said agreement; but on the contrary, the water-wheels built and furnished by the libellants as a material part thereof, had not been and were not secured and supported at the rims or external parts thereof, in such manner as is necessary for their firmness, security, and permanency, when worked under the great power contracted to be given to the engine of this boat; and said wheels have proved inadequate and insufficient in strength for the successful operation and running of said boat.

6. It is further found by the Court, that the claimants had not, by themselves or agents, at the time this suit was commenced, accepted and received the said engine and boilers, with their appurtenances, or any part thereof, from the libellants, as a true performance and fulfilment on the part of the libellants of the contract aforesaid; nor had the said engine and boilers been constructed, put up, and completed under the directions and with the assent and approval of the claimants, as to the particulars in this decree before specified, in such manner as to discharge or relieve the libellants from a true performance of the said contract, according to the terms and obligations thereof.

7. It is accordingly considered by the Court, that the claimants are entitled to compensation in this suit, by way of abatement or subtraction from any balance remaining due the libellants upon the said contract, because of the defective and insufficient performance thereof by the libellants.

8. It is further found by the Court, that by superintending the said work during its whole progress, and urging its completion, up to the time of its delivery, and long after the period fixed in the contract for such completion, and by then permitting the same to be delivered by the libellants as under and in fulfilment of the contract, without notice to them after the time for performance had arrived that damages would be claimed because of the delay, and without notice or inti-

mation when the work was delivered that it would not be accepted under the contract for that cause, the claimants have waived the right to set up the non-execution of the contract by the libellants within the time therein stipulated, as an absolute failure to perform the same, or as thereby being exonerated or discharged from their obligation to make the payments in said contract engaged to be made on their part. But it is considered by the Court, that the claimants are entitled to be reimbursed and satisfied for all charges, expenses, and disbursements actually and necessarily incurred by them during the period of such delay, and in consequence thereof; not, however, including therein any estimated value of said boat for that period, if finished, nor any supposed profits to be derived from her employment or hiring therefor.

9. It is further found by the Court, that the libellants were not bound by the said contract to fasten the gallows-frame of said boat with iron work, nor to supply and put up the upper pipes, substituted, at request of the claimants, for the one first prepared to lead the steam from the boilers to the steam-chest, nor to put up and fasten the suspension-frame for the blower engines; and are entitled to a reasonable compensation therefor, over and above the payments stipulated in said contracts.

10. It is further found by the Court, that the libellants are not entitled to extra compensation for any work, arrangements, or conveniences, applied to the boilers themselves, it appearing to the Court that none have been supplied beyond the modern improvements used in approved boilers on the Hudson River at the time said contract was made. But as to the other particulars claimed in the bill of the libellants attached to their libel as extra and not embraced in the said contract, their allowance or disallowance will be deferred to the coming in of the report on the reference ordered in the cause.

Wherefore it is ordered and decreed by the Court, that the

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libellants recover in this action the arrears and balance of moneys due them, upon the aforesaid contract for building the said engine, boilers and appurtenances thereto, and securing the same in the said steamboat Isaac Newton; and also compensation for the particulars above specified, extra and beyond the amount stipulated to be paid by said contract; and to be ascertained and adjusted as hereinafter directed; subject, however, to an allowance and credit to the claimants, to be ascertained as hereinafter directed, because of the defective and imperfect performance of the said contract in the particulars before specified, and because of their expenses and disbursements in consequence of the delay of the libellants to perform their contract within the time therein stipulated.

It is accordingly ordered and decreed by the Court, that it be referred to assessors or commissioners, to be designated as hereinafter directed, to inquire and ascertain the fair and reasonable value and worth of the labor and materials charged by the libellants as extra, beyond the said contract in the account attached to their said libel, and also to inquire and ascertain whether the iron pans to hold cement, the sheet iron flooring laid in the fire-rooms, or any and every other item of said account, are properly and fairly appurtenances to the engine or boilers, as modern improvements to approved boilers and engines, known and used on the Hudson River in the year 1845; and also to inquire and ascertain whether the charges for tools, bells, and fixtures included in said account, embrace any, and what, which are necessary tools, fixtures, and bells for this engine.

And it is further ordered and directed, that the said assessors or commissioners inquire and ascertain what would be the reasonable cost and expense of so altering and improving the said boilers, "as that they shall supply the said engine at least forty pounds of pressure of steam to the square inch of the piston of said engine, with the throttle wide open, and

The Columbus.

also so as to reduce the consumption of fuel proportioned to that consumed by boilers of approved construction, with the modern improvements, employed on the Hudson River, anterior to November 1, 1845 ;” and also to inquire and ascertain the expense or value of braces or rims to the water wheels, sufficient to render the same secure when the said engine is worked with the power aforesaid ; and also to inquire and ascertain the amount of payments and disbursements actually and necessarily made by the claimants between the 15th day of May and the 8th day of October, 1846, for wharfage for said steamboat, for insurance on her, and for keeper’s wages on board her ; and report to the Court upon the particulars aforesaid, with all convenient speed.

And it is ordered, that each of the parties aforesaid nominate to the Court in writing, within ten days, three competent and disinterested persons, as assessors or commissioners in this behalf, from whom the Court may designate and appoint the assessors or commissioners to whom the matters aforesaid are referred.¹

THE COLUMBUS.

An objection to the *regularity* of a commissioner’s report cannot be brought forward by *exception* to the report ; but should be raised by *motion* founded upon the irregularity.

An exception to a commissioner’s report draws in question only the reasons upon which the report is founded.

A cargo of goods, being in part damaged and in part sound, was sold at auction by the consignees, without separation of the sound from the unsound.

Held, that it was the duty of the *master* not of the *consignees* to make such sepa-

¹ The cause came before the Court again, December 27, 1850, on exceptions to the report of the commissioners appointed by the above decree.

The decree upon the merits was affirmed by the Circuit Court, October 2, 1852.

The Columbus.

ration, if requisite to obtain a favorable sale; and that the want of it did not prevent the consignees from relying upon the auction price as showing the value of the goods as damaged.

How far sales at auction are sanctioned in such cases.

THIS was a libel *in rem* by Gustavus Loenig and Charles Schneider against the bark Columbus, to recover damages for injuries received by goods shipped on board the bark to the libellants as consignees.

A large quantity of corks, amounting to nearly ten thousand gross, were shipped at Bordeaux, on board the Columbus, consigned to the libellants, at the port of New York. The usual bill of lading was signed by the master. As is usual with such goods, the corks were packed by the consignees in small packages, called pockets, containing about fifty gross of corks each, and these pockets were again packed in bales, in a stouter covering. For convenience of stowage, the master of the vessel cut open the bales, and, taking out the pockets, stowed them in the hold. In consequence of this, a large portion of the corks were found, upon unloading, to be much damaged by wetting, &c. They were taken into the libellants' warehouse; and, after some negotiation with the master of the vessel respecting the liability of the vessel for the loss, they were sent by the libellants, with the assent of the master, to auction, and sold as damaged. The libellants then instituted this action to recover for the injury.

The cause having been referred to a commissioner, to report the amount of libellants' damages, he made his report, dated April 5, 1847, estimating those damages at \$232.

The cause now came before the Court upon exceptions taken to the report by both libellants and claimants. The grounds of these exceptions sufficiently appear in the opinion.

Francis B. Cutting, for libellants.

E. C. Benedict, for claimants.

BETTS, J. The claimants take two exceptions to the report of the commissioner in this case, dated April 5, 1847, and they have set the cause down for hearing upon those exceptions.

The libellants also except to the report upon the ground that the commissioner had already on March 29, 1847, made and filed his report in the cause, a copy of which duly certified by the clerk, had been delivered to them; and that the subsequent report made April 5, was unauthorized and void. They have set this exception down for hearing.

In respect to the latter exception, it is clear that the regularity or irregularity of the report of April 5 cannot be determined in this manner. An exception to a commissioner's report goes to the merits of his decision, and reaches no further than to bring before the Court for consideration, the adequacy of the grounds in law or fact, upon which the report is founded.

For the purposes of such investigation, the report must be assumed to have been made within the scope of the order of reference. An exceptive allegation to a proceeding in a cause has, in the civil law, the character of a plea, (*Wood's Civ. L. b. 4, c. 3*; *2 Browne's Civ. & Adm. L. 361, 362*; *Betts's Adm. Pr. 48*,) and cannot properly be employed in the Admiralty practice to determine the regularity of the acts of an officer of the Court, not incorporated in and constituting a substantive part of the proceeding excepted to. *Betts's Adm. Pr. 38*.

The objection raised by the libellants, being extraneous to the merits of the case, should have been brought forward by motion founded upon the alleged irregularity. Upon such motion the facts upon both sides would be brought out, and the Court would be enabled to determine whether the fact was as the exception charged, or was unjustifiable or injurious.

The exception taken by the libellants must be overruled,

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because it does not, as I understand it, touch the matter reported upon by the commissioner.

The first exception taken by the claimants is to the allowance of \$232 by the commissioner as the amount of damages sustained by the libellants. It is urged that the proofs do not warrant an allowance for the injury the corks received on shipboard, or during their transportation, exceeding one cent and a half the gross; at which rate the amount would be less than \$150.

A witness, experienced in the trade, gave it as his opinion that the corks could have been picked over by hand, before the sale, and the damaged ones separated from the sound, at an expense of about one cent per gross. If this course had been pursued, the corks would doubtless have sold to better advantage, and the loss sustained have been considerably reduced. It appears, on the evidence, that this would have been a tedious and troublesome process, and I do not think it devolved upon the libellants to assume the hazard or cost of the undertaking. It was the duty of the master if of any one, to separate the sound from the unsound, and deliver to the libellants that portion of the cargo which was sound, and compensate them for that which was deficient or deteriorated. In default of his so doing, the vessel must make good the damages ascertained by the testimony of competent witnesses, or determined by an actual sale of the merchandise.

Sale by auction is in the great marts of commerce so commonly resorted to by merchants to ascertain the value of deteriorated merchandise, that it may almost amount to an usage of trade. It furnishes, cheaply and promptly, all the accuracy which can be expected in any known measure of damages, and it is peculiarly fitting, in cases of this character, that the Court should sanction and sustain it as the method best adapted to protect the interests of all parties concerned.

The present case, however, does not afford an occasion

rendering it necessary to pronounce upon the sufficiency in law of the public sale to determine the value of these goods after the injury was received, because the witnesses who appraised the corks in their damaged condition, testified that they considered the prices brought at the auction sale to have been fully equal to their value. That value would show not only that the deficiency or damage was equal to \$232, but, as I understand the evidence, that it may probably have considerably exceeded that sum.

The first exception of the claimants is accordingly overruled.¹

The second of the claimants' exceptions relates to the form of the report, and does not appear to have any practical bearing or effect, or to be entitled to weight.

The exceptions upon both sides are accordingly disallowed, without costs to either party.

LEAK v. ISAACSON.

A receipt in full of all demands given by a seaman to the master or owners, is open, in a Court of Admiralty, to explanation by proof that at the giving of the receipt there existed a demand in favor of the seaman which was not in fact satisfied by the payment made.

When so explained, the receipt does not bar the seaman from recovering upon such outstanding demand.

To free a demand from the operation of a receipt in full of all demands, in a Court of Admiralty, it is necessary that the evidence that there was a valid demand existing when the receipt was given, and that it was in fact not satisfied by the payment made, should be clear and convincing.

THIS was a libel *in personam*, by George Leak against

¹ The case came before the Court again in January, 1848, upon exceptions to a further report of the commissioner, when the effect of the sale by auction, in fixing the value of the goods in their damaged state, was further discussed. See the report of the case, *post*, in its order.

Leak v. Isaacson.

Michael Isaacson, owner of the steamboat *Proprietor*, to recover a balance of wages earned as engineer.

The facts were substantially as follows :—The libellant was hired by the respondent in New York to go to Charleston, and there to go on board the *Proprietor* as engineer. No wages were agreed upon ; but the value of the services for the time for which the libellant was attached to the boat was shown to be \$70. The libellant went to Charleston at his own expense,—a service shown by the testimony to be worth \$25, exclusive of travelling expenses. He also boarded for some days in Charleston. On the termination of libellant's service on the boat, the crew were paid off by Martin, the master, the libellant receiving the sum of \$70. Upon that occasion, he, in common with the rest of the crew, signed a receipt in the following terms :—

“ This is to certify, that the undersigned have this day received, from Mr. Michael Isaacson, the full amount of our and each of our claims or demands, of every nature, against the steamboat *Proprietor* or her owner.

“ Dated New York, May 31, 1847.”

Prior to this time, the libellant had received at Charleston the sum of \$19 ; but it did not appear whether this was for services or travelling expenses. The respondent now relied upon the receipt as being conclusive against the claim.

The libellant offered evidence in explanation of the receipt as follows :—Three witnesses, who were present when the receipt was signed, testified that Leak then claimed a balance due him, over and above the \$70 earned upon the boat. A fourth witness testified that the respondent had told him, that he, the respondent, had agreed to pay the libellant \$25 for his journey to Charleston, and that Captain Martin was to pay the rest.

The principal question was as to the conclusiveness of the receipt.

Alanson Nash, for the libellant.

J. Townsend, for the respondent.

BETTS, J. A receipt in full may form an exception to the familiar principal of law which permits receipts to be explained by parol evidence. The receipt of a sum *in full* of a debt is something more than simple evidence of the payment of the sum specified. Such a receipt betokens a controversy between the parties as to the amount due, a difference of opinion upon that point, and a mutual compromise and adjustment of a disputed indebtedness at the precise sum mentioned in the instrument. The receipt in full may well be regarded as embodying a compromise; and although fraud or serious mistake will sometimes authorize it to be disregarded, yet, under the municipal law as it prevails throughout all our States, such an instrument can only be avoided by clear evidence of a deceit, or gross mistake as to the rights concluded by it. The fact that the sum received is inadequate compensation for the claim, does not constitute a case which authorizes the disregard or opening of a formal and final receipt in writing; it is necessary, further, that the party should show that he acted under ignorance or misapprehension as to the nature or extent of his rights involved therein. *Lawrence v. The Schuylkill Navigation Company*, 4 *Wash. C. C. R.* 562. Thus, if the rights in claim are questionable, and honestly resisted, and time is given the creditor to consider the proposed payment, his receipt, given for less than his true demand, will not be set aside. It will be regarded as meaning deliberately to accept a lesser sum in payment in full of all demands; and cannot be easily opened to admit proof that unspecified particulars were intended to be accepted.¹

¹ The case of *Cash v. Freeman* (35 *Me. R.* 483,) illustrates this principle. That was an action upon a note for \$12, due *July*, 1851. The defence relied on a receipt given *May*, 1851, for \$1.50, in full of all demands. Although the note was not surrendered at the time of giving the receipt, it was held to be within its operation. See, also, *Cunningham v. Batchelder*, (32 *Me. R.*

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In the view of Admiralty, however, there is reason for imposing a more restricted rule in respect to receipts passed by seamen to masters, owners, or shipping agents. The parties in these settlements do not usually deal with each other upon equal terms. The seaman stands in a position which exposes him to be coerced or deluded into giving a receipt of this character, upon the temptation of a little ready money in hand, when no *bonâ fide* settlement has been made; and upon the ground of this inequality, and as a measure of protection to parties who are seldom qualified to protect themselves, Admiralty will admit evidence in explanation of a receipt, no matter how clear, explicit, and conclusive its terms and solemnities may be. The doctrine of the maritime law on this subject is fully stated in the case of the *David Pratt, Ware*, 495. In that case, in answer to a demand for wages, the defendant set up a receipt; *under seal*, signed by the libellant and others of the crew, of specified sums, "in full for our services in wages on board said vessel; and in consideration whereof, and of *one cent* to each of us paid, we have released,

316,) where the principle that promissory notes, although left in the hands of the payee, are within the legitimate operation of a receipt in full, is also laid down.

In confirmation of the general doctrine laid down in the text respecting the operation of the receipt in full, in the courts of law, see *Paige v. Perno*, 10 *Vt. R.* 491; *Reid v. Reid*, 2 *Dev. Law R.* 247; *Ennie v. Gilbert, Wright*, 764; *Bailey v. Day*, 26 *Me. R.* 88; *Palmerston v. Huxton*, 4 *Den.* 166; *Thompson v. Faussat, Pet. C. C. R.* 182; *Bristow v. Eastman*, 1 *Esp.* 173; *Alner v. George*, 1 *Campb.* 392; *Eve v. Mosely*, 2 *Strobh.* 203; *Holbrook v. Blodget*, 5 *Vt. R.* 520; *McDowell v. Lenaitre*, 2 *McCord*, 320. To learn what grounds have been held sufficient to authorize the opening of a receipt in full by evidence of fraud or mistake, consult *Thomas v. Austin*, 4 *Barb. Sup. Ct. R.* 265; *Patterson v. Ackerson*, 1 *Edw. Ch.* 101; *S. C.* 2 *Ib.* 427; *Derrickson v. Morris*, 2 *Harring.* 292; *Dibdin v. Morris*, 2 *Carr. & P.* 44; *Trisler v. Williamson*, 4 *Harr. & McH.* 219; *Lessions v. Gilbert, Brayt.* 75; *Benson v. Bennet*, 1 *Campb.* 394, note; *Snyder v. Finley, Coxe*, 48; *Hogg v. Brown*, 2 *Brev.* 223; *Middleditch v. Sharland*, 5 *Ves.* 87.

and do hereby release and discharge forever, the master, officers, and owners of said vessel, and each of them, of and from all suits, claims, and demands, for assaults and battery and imprisonment, and every other matter and thing, of whatever name or nature, against said schooner David Pratt, the master, owners, and officers, to the day of this date."

It was conceded by the Court that this instrument was *primâ facie* evidence of payment, and sufficient, until falsified by positive proof, or strong presumption; and this is undoubtedly correct. But the notion that such an instrument, formal and solemn though it was, must be accepted as in itself conclusive against the claim, was justly repudiated as contrary to the free and equitable spirit of Admiralty jurisprudence, however consonant it might be with the more rigorous doctrines of the common law.

A very analogous decision was made in the Supreme Court of New York, in the case of *Thomas v. McDaniel*, 14 *Johns*. 185. The decision in that case rested upon the *indicia* of fraud observable in the facts shown, rather than upon any general principle of protection to seamen; although the latter consideration is distinctly adverted to in the opinion of the Court. The action there was by a seaman against the master for an assault and battery, committed during the voyage. The defendant offered a receipt, signed by the plaintiff, acknowledging to have received \$60.50, "in full of all demands against the ship Independence, her officers and owners, for wages; also, \$1.00, as a full compensation for every thing else."

A witness testified, that upon the settlement he explained the receipt to McDaniel, by stating that the one dollar was intended as a full compensation for all other claims except wages; and that the plaintiff at first refused to sign the paper, and waited three or four days. The master then put the money and the receipt upon the table, and told the seaman that he might sign or not, as he pleased. The plaintiff read

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over the paper and signed it, and received the money, nothing being said about assault and battery. The judgment in the Court below was for the plaintiff, and was affirmed on appeal.

"There is strong ground to infer," say the Court, "that the receipt was unfairly obtained. It was coupled with a receipt for the wages of the seaman, and the evidence shows that his wages, after being liquidated at \$60.50, were withheld by the captain during three or four days, because the plaintiff refused to sign the double receipt. To a person in the situation of a seaman just arrived in port, after a long voyage, and probably without a cent of money, this was a fraudulent constraint on the part of the captain, from which the law will protect the seaman. It cannot be doubted, that if the wages had been unconditionally paid, the plaintiff would peremptorily have refused to sign the receipt for one dollar for every thing else."

The receipt in this case is, therefore, not to be regarded as absolutely concluding the libellant, while it is *prima facie* evidence of payment in full. It is open in this Court to explanation, not only by evidence of fraud or of ignorance of the outstanding claim, but also by clear and distinct proof, that at the time of the settlement there was a valid outstanding claim which was not in fact embraced in the payment actually made. This would not be sufficient at common law, unless it were also shown that the rights of the party in respect to such outstanding claim were in some respect unknown or misunderstood by him, and this through no fault or neglect of his. In Admiralty, however, it is enough that a valid outstanding claim be shown, if the proofs are such as to put its existence and validity beyond question. I have, therefore, received and considered the evidence offered by the libellant upon this point.

The evidence does not appear to me of that clear and explicit character which will justify the Court in disregarding the receipt. It is denied by the answer, and is at least equivocal upon the proofs, that the libellant was entitled to any

wages antecedent to the time when he joined the boat at Charleston. The libellant claims to regard the payment made to him in Charleston as having been made only upon account of his demand both for wages and expenses accrued during the journey; but I think it may be fairly regarded, under the proofs as they stand; as intended for a satisfaction of all claims preferred by him upon the score of his employment prior to his joining the steamboat; particularly as it is equivocal whether he was entitled to demand any thing beyond the reimbursement of his expenses. In that view of the case, the receipt of the 31st of May, in my opinion, closed the whole transaction, and the respondent is accordingly entitled to a decree dismissing the libel.¹

Decree accordingly.

¹ A rehearing of the cause was had before a commissioner in August, 1847, for the purpose of taking additional proof. The commissioner reported that \$25 was due to the libellant. The cause came again before the Court in January, 1848, upon exceptions to the report, when the following decision was made:—

BETTS, J. The additional evidence adduced before the commissioner in explanation of the receipt relied upon by the respondent in this case, consists in the testimony of a witness, who states that the usual charge for a passenger on board the steamer Southerner to Charleston was \$25. He also states that mariners employed for other ships were not taken gratuitously on board that vessel. Upon this the commissioner reports \$25 to the libellant.

I have reviewed all the pleadings and proofs to see whether any reasonable evidence is furnished tending to show that the libellant was not paid to his satisfaction for all the services and expenditures rendered by him under his engagement with the respondent. I do not think the suppletory testimony taken before the commissioner in any respect strengthens the libellant's case. It is not additional to that produced on the hearing, further than that it fixes the usual price of a passage to Charleston. It does not show that the libellant paid that amount, nor that the \$19 paid him in Charleston was not advanced to cover that disbursement. If any thing could be presumed to be due, it would not exceed \$6, the difference between \$19 and \$25, and it is wholly conjectural whether or not the libellant ever disbursed that sum. The claim is a very small one, and does not merit the protracted litigation it has

The Zenobia.

THE ZENOBIA.

Where a libel is filed for a cause of action upon which both vessel and master may be together liable, the Court will not make an order that the libellant elect between the remedy *in rem* and that *in personam*, nor that he submit to have either the arrest of the respondent or the attachment against the vessel vacated.

In respect to the liability of the ship for contracts made with the master for transportation for hire in the regular course of the vessel's occupation, the law makes no distinction between the transportation of passengers and of merchandise.

Where an agreement is entered into between the master of a vessel and a passenger, for the transportation of the latter, with his baggage, and passage-money is paid in advance, and the agreement is unperformed through the fault of the master, the ship is liable, *in specie*, to refund the advance passage-money, and to pay damages for any failure to deliver the goods shipped.

There is no abstract incompatibility between proceedings *in rem* and proceedings *in personam*, which forbids them to be joined in one action where such joinder is calculated to advance the ends of substantial justice.

Where both the vessel and the master or owner are conjointly liable upon a contract of affreightment, the personal remedy, and the remedy against the vessel, may be sought in one and the same action.

THIS was a libel filed by Henry J. Carr against the bark Zenobia, *in rem*, and also *in personam* against her master, A. R. Cronstadt, to recover damages for the non-performance of a contract of affreightment.

The libel stated in substance that the libellant, in November, 1847, at Whampoa, China, engaged passage for himself and family, with their personal baggage, and certain merchandise or freight, on board the Zenobia, for the United States, and thereupon shipped sundry cases of merchandise, among which was a chest of drawers containing twenty-five hun-

generated. The libellant ought to have remained silent after his full and solemn receipt in writing, unless he was able to give convincing proof that other demands were due him, and were reserved out of that full settlement. I am not satisfied that this was so, and shall accordingly allow the exception taken to the report, with the costs accruing upon the exception.

The Zenobia.

dred dollars in specie. The agreement was made with Cronstadt, the master of the bark, to whom libellant paid \$150 in advance, being one half the passage-money stipulated. November 28th was the appointed day of sailing, but the vessel sailed two days previous to that time, unknown to libellant, leaving him and his family behind. The libellant followed the Zenobia to this country, and arrived, as it happened, a few days before her. On the arrival of the Zenobia he went on board and claimed the property shipped by him. The master, however, refused to deliver it, or to recognize the libellant as its owner, and moreover refused to make the proper entries upon the ship's manifest, which were necessary to enable the libellant to obtain the property from the custom-house.

For a fuller statement of the facts, reference is made to the case upon the final hearing, December, 1847; which is reported, *post*, in its order of time. The libel, as amended under the direction of the Court upon this hearing, and the substance of the answer, are there given.

Upon this libel, process was issued against the master, upon which he was arrested and held to bail; and also against the bark, for which the usual stipulations were given on the part of the owners. The master then moved in the cause, "that the libellant be required to elect whether he would proceed *in rem* against the vessel, or *in personam* against the master; and that either the arrest of the master or the attachment against the vessel should be vacated."

BETTS, J. The libel being filed for a double cause of action on the shipping contract and for its tortious violation by the master, for which the ship and master may be unitedly liable, the case is not one in which the Court will compel the libellant to elect which branch of his remedy he will pursue. He may maintain the suit *in personam* against the master for

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wrongfully abandoning the libellant and his family in China, and for abstracting or withholding, in the exercise of his authority over the ship and her lading, the specie and baggage shipped on board, and may therein seek damages against the master beyond the liability of the ship: According to the practice in this district, he may also pursue his claim in a joint action against the ship *in rem* and the master personally, upon the contract of affreightment, and for the transportation of himself and family; (*Betts's Adm. Pr.* 20;) provided he establishes a case within the jurisdiction of the Court.

The motion to dismiss the suit, because of incongruity or multifariousness in the demands, is therefore denied.

The owner of the Zenobia, David Carnigie, intervened and filed exceptions to the libel for insufficiency.

The objection raised by the first exception was, that the Court had no jurisdiction to enforce such a claim as was preferred in the libel against the *vessel and owner*.

The second and third exceptions raised the objection, that at any rate the claim was not one which could be enforced both against the vessel *in rem*, and against the master *in personam*, in the same libel.

The remaining exceptions related only to the form of the libel, as tested by the rules promulgated by the Supreme Court, and raised no questions of importance. These exceptions, save one only, were allowed, and the libel ordered to be amended in the particulars to which they related. The opinion of the Court relates almost wholly to the questions raised upon the liability of the vessel for the cause of action shown, and upon the propriety of uniting the claim against the vessel and the personal claim against the master in one action.

Francis B. Cutting, in support of the exceptions.

Abner Benedict, opposed.

BETTS, J. The allegations of the libel are deficient in perspicuity and certainty; but I think a reasonable construction of the pleading as a whole, may regard it in effect to represent the master as having wilfully withheld the property shipped by the libellant on board the vessel, and as having put impediments in the libellant's way on ship-board and at the custom-house, and prevented him from receiving its delivery at this port, and as refusing to repay the passage-money advanced to him, or to recognize the libellant as having any right to or interest in the baggage and other goods shipped by him on the vessel.

The first legal point raised against the action is, that the ship is not liable for the undertaking of the master, to bring the libellant and family to this country as passengers.

It is unnecessary to consider whether the vessel would be chargeable with a lien upon a naked agreement for the carriage of libellant, for in this case a part of the passage-money was actually paid in advance.

The agreement was plainly within the authority of the master, and the receipt of the money was for the benefit of the ship-owner, and was so much freight paid.

In respect to the liability of the ship for contracts of transportation made with the master, the law makes no distinction between passengers and merchandise, each being alike carried for hire, and in the regular course of the vessel's occupation in trade and commerce. *Wolf v. Summers*, 2 *Campb.* 631; *Mulloy v. Barker*, 5 *East*, 316; *Howland v. The Lavinia*, 1 *Pet. Adm. R.* 123; *Griggs v. Austin*, 3 *Pick.* 20.

There is no reasonable ground for doubt, that if the libellant had paid in advance the freight of his goods, and the master had designedly left them behind in China, the vessel would be answerable to the amount of freight so received. This would be both because the vessel is bound in specie for the fulfilment of the contract of the master made within the scope of his powers, (3 *Kent*, 218, note; *The Volun-*

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teer, 1 *Sumn.* 551; The Phebe, 1 *Ware*, 263; *Curtis on Merch. Seam.* 169,) and because the vessel is liable for the repayment of freight not earned by the wilful failure to perform the contract of affreightment. *Mashiter v. Buller*, 1 *Campb.* 84; *Pitman v. Hooper*, 3 *Sumn.* 50; *Watson v. Duykinck*, 3 *Johns.* 335; *Griggs v. Austin*, 3 *Pick.* 20.

It is equally clear, that the neglect or refusal of the master, without justifiable cause, to deliver the goods at the port of destination, renders the owner, and consequently the ship, responsible upon the contract of affreightment. *Abbott on Shipp.* 156, 275; *Curtis on Merch. Seam.* 198.

These principles, so well established in their application to contracts for the transportation of merchandise, are applicable also to agreements for the carrying of passengers. The ship is therefore liable in specie to refund the passage-money advanced by the libellant, and to pay damages for the non-delivery of the goods shipped by him.

The libellant is entitled to the responsibility of the ship to cover these liabilities of the master, and is not obliged to rely solely upon the personal responsibility of the master or owners. Had application been made to the Court to reduce the amount of bonds exacted from the ship, the Court would have taken care that the owners were not charged with an unreasonable amount of security, and would have discharged the attachment upon stipulations sufficient to cover the probable recovery and costs. But the exception taken by the claimants to the right of libellant to maintain upon the facts charged an action *in rem*, cannot be sustained.

The next general point made by the exceptions is, that this suit cannot be prosecuted conjointly *in rem* and *in personam*.

This objection is supported by the language of Judge Story, in *The Citizens' Bank v. The Nantucket Steamboat Company*, 2 *Story*, 57. In that case, a libel *in rem* against a steamboat, and *in personam*, against her master and owners, was filed to recover the value of bank-bills entrusted to the

master for transportation, and lost on the passage. The Judge remarked, that he knew of no principle or authority in the general jurisprudence of the Courts of Admiralty which would justify such a joinder of proceedings, so very different in their nature and character and decretal effect. "On the contrary," he says, "in this Court, every practice of this sort has been constantly discountenanced as irregular and improper." And again he says, "in cases of collision, the injured party may proceed *in rem* or *in personam*, or successively in each way, until he has full satisfaction. But I do not understand how the proceedings can be blended in the libel."

The objection thus suggested to the joinder of the two remedies was evidently placed upon a supposed incompatibility between the two modes of proceeding, rendering them improper to be combined in one action. It is not because, in the case before him, there was not both a personal remedy and a remedy against the ship, that the learned Judge disapproves the practice referred to, but it is upon the ground that the proceeding *in personam* and the proceeding *in rem* are "so very different in their nature and character and decretal effect." It is obvious therefore, that the objection, if sound, applies in all cases, irrespective of the nature of the cause of action.

Conceding the view taken by the learned Judge to have been a correct exposition of the practice as established in October, 1841, the date of the decision above cited, it must be regarded as untenable since the adoption of the rules of the Supreme Court, framed pursuant to the Act of Congress of August 23, 1842. 5 U. S. Stats. 518, c. 188, § 6. Those rules make specific provision in respect to the mode of pursuing remedies by libellants in several classes of cases. They authorize libellants in suits for mariners' wages, for pilotage, or for damages by collision, to proceed against *the ship, and master, or owner*, or against the ship alone, or against the

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master or owner alone, *in personam*. Rules 13, 14, 15. In cases of maritime hypothecation by the master, or for salvage, the libellant must elect between the remedy *in rem* and a personal suit. Rules 17, 19. And in suits for assault and battery he is restricted to a suit *in personam* alone. Clearly, therefore, it can be no longer contended that a joinder of the two remedies in one action is impracticable, or inconsistent with the theory upon which the Court proceeds in awarding relief; or that there is any incompatibility in principle between the two forms of proceeding, either in their nature, character, or decretal effect, which forbids their union in one action, in those cases in which such joinder is calculated to advance the interests of substantial justice.

It is true that the case of a suit for damages for non-fulfilment of a contract of affreightment, or one brought to recover back freight paid in advance but not earned, is unprovided for by either of the Supreme Court Rules. Those rules do not contain any specific authority to unite the two remedies in claims of that character. They do not, however, forbid the joinder. The consequence is, that such cases fall within the scope of Rule 46, which prescribes that in all cases not provided for by the foregoing rules, the District and Circuit Courts are to regulate the practice of those courts respectively, in such manner as they shall deem most expedient for the administration of justice. The practice in respect to the question under consideration is therefore left to be regulated at the discretion of the courts in the various districts.

I perceive no principle demanding a distinction in respect to joining in the same action a personal remedy with one against the ship, between an action founded upon a contract of affreightment, express or implied, and one brought to recover wages or pilotage, or for damages by collision. The considerations of convenience which dictated the permission given by the rules of the Supreme Court, to combine the actions in the last mentioned cases, seem to apply with equal force to the case now before the Court.

The practice in this district, on the Instance side of the Court, has, moreover, always been different, it is believed, from that pursued in the Massachusetts district, as stated by Judge Story in the case above cited. The party directly liable upon the claim chargeable upon the vessel may, in this Court, be joined with the ship in one suit, and a decree may be prayed and taken against him *in uno flatu* with that against the vessel. Or, for want of a prayer to that effect at the initiation of the suit, the libel may be amended by inserting it, even after decree *in rem* rendered, if that decree proves fruitless to the libellant, and if the party sought to be personally charged has appeared and contested the suit. The expense and delay of two or three actions requiring to be disposed of upon identically the same pleadings and proofs, are thus saved the creditors, and the association of remedies promotes the simplicity and celerity so much sought for and favored in Admiralty procedure.

It seems to me, also, that this is the spirit of the English practice, both early and modern, although under that system a somewhat circuitous method was originally employed in effecting the object. Instead of directly arresting the party sought to be made personally responsible, it seems, in actions lying purely *in rem* against vessels, that when the owner enters an appearance, the Court thereupon takes jurisdiction over him individually; because, appearance in the English Admiralty being by stipulation, the Court thus acquires the power to act against him *in personam*. 2 *Browne's Civ. & Adm. L.* 398; *Ib.* 407-409. And his *fide jussors* are compelled to satisfy the condemnation and costs. *Clarke's Praxis*, tit. 4, 5, 12.

The practice continues substantially the same in the English Admiralty to this day. The *St. Johan*, 1 *Hagg. Adm. R.* 334; The *Tribune*, 3 *Ib.* 114. The case of the *St. Johan* also shows, that where the remedy is doubtful against the vessel, but is legal and equitable against the owner, the Court.

will avail themselves of his appearance to decree the debt and costs against him personally. This personal appearance is also constrained by the course of the Court; for in suits *in rem*, on his failure to intervene, the property is absolutely condemned to the libellant. 2 *Browne's Civ. & Adm. L.* 400.

I am not aware that any confusion or perplexity need arise in respect to the decree to be pronounced in a case thus prosecuted. If the action be *in rem* only, a decree is rendered for the sum which the prevailing party is entitled to recover, and the *thing* is condemned, *i. e.*, ordered to be sold to satisfy the decree. If the suit is *in personam*, the decree is the same in all essentials, varying only in that it directs execution by *fieri facias* or by *capias ad satisfaciendum*, instead of *venditioni exponas*.

I think that the mode of procedure resorted to in this case is not only justifiable upon authority, but that it is one that ought to be encouraged, as tending to prevent a multiplicity of actions for the same cause, in cases where all the rights and remedies might be equally well secured in a single suit. An action against both the ship and the master may oftentimes be indispensable. Cases not unfrequently occur in which neither remedy is separately adequate to afford complete relief. The Court will, however, be cautious so to guard the practice that exorbitant stipulations shall not be exacted, and that double arrests shall not be made in cases of doubtful right or for trivial amounts. *Betts's Adm. Pr.* 20.

In the present case, the ship and master are separately and conjointly liable for the passage-money advanced by the libellant, and also for the safe delivery of the merchandise and baggage shipped by him. The master may also be individually liable for any wilful misconduct in the transaction, committed by him, but out of the scope of his authority as master, by which the libellant has been prejudiced, although the ship and owner may not be conjointly chargeable therefor. The libel is so drawn as to leave it ambiguous, whether damages

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are sought to the amount of the value of the merchandise and baggage and specie charged to have been shipped, as not having been delivered at all, or whether it only seeks compensation for the oppressive and tortious conduct of the master, in baffling the libellant in obtaining his rights and property from the ship or master. If the latter is the only object of the action, there certainly can be but slight reason for continuing the suit against both the vessel and the master; and on a proper application, the Court will see that the owners are relieved from all unreasonable burdens in that respect.

The first three exceptions, relating to the jurisdiction of the Court, are therefore disallowed. The remaining four relate to the formal construction of the libel. As it does not conform to the requirements of Rule 23 of the Supreme Court, those exceptions are allowed, save only exception 5, which is disallowed, the libel being sufficient in the particular to which that exception relates. The libellant must take proper measures to reform his pleading before proceeding with the cause. This order is without costs.

THE HORNET.

Under the Act of Congress of March 2, 1799, (1 *U. S. Stats.* 696, § 90,) the notice of sale in cases of condemnation under the act must be published every day for fifteen days, in the newspapers directed by the act.

Under Rules 47 and 48 of the District Court, notice of sale under *venditioni exponas*, (except on condemnation of property on seizure by the United States,) must be published for six days; and the sale will be set aside if this full number of publications is not made.

THIS was a libel *in rem*, by Nathaniel Finney against the schooner Hornet, to recover wages as pilot.

A decree was entered in favor of the libellant, by default, and a sale of the vessel upon *venditioni exponas* was made under the decree. Thomas T. Sturgess and James S. Stur-

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gess, as attorneys in fact for the owners, who were residents of Maine, now filed a claim and moved to set aside the sale made, on the ground of irregularity in the notice of sale, and to open the decree rendered by default, and to allow the claimants to come in and defend the case. The grounds of the motion appear in the opinion.

BETTS, J. All the proceedings in Court, on the part of the libellant, up to the notices of sale, were regular. The claimants failed to show any fraud or collusion on the part of the master, in respect to the attachment of the vessel, or in respect to his admissions of the demand set up by the libellant. If, therefore, relief was afforded them against the proceedings in Court alone, it could only be upon terms which would fully reimburse the libellant, and save him harmless against defences merely formal in their character.

It being, however, the judgment of the Court that the sale of the vessel was irregular, and that it cannot be sustained, the setting it aside will place the cause in a condition where the libellant will incur no delay or injury by letting in a full defence, beyond what he would have been subjected to if the claimants had intervened and filed their answer upon the return of process, since it does not appear that any opportunity to try the cause will have been lost by the proceeding.

The main question considered by the Court is that raised as to the irregularity of the sale.

The *venditioni exponas* was issued the 20th of July, and the marshal made sale of the vessel under it the 27th following. The advertisement of the notice of sale was first published the 21st of July, and was published but *five* times in all, previous to the sale.

The rules of this Court direct that notices of sale, &c., shall be six days, and that all such notices shall be published in the manner directed by the Act of Congress, in cases of condemnation under the revenue laws. *Dist. Ct. Rules*, 47, 48.

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The act referred to (*Act of March 2, 1799, c. 22, § 90, 1 U. S. Stats. 696,*) prescribes that ships, &c., condemned under the act, shall be sold at auction, giving at least fifteen days notice, in one or more of the public newspapers of the place where such sale shall be; or if no paper is published in such place, in one or more of the papers published in the nearest place thereto.

The terms of the act are very explicit and definite. No less than publication for the required number of days is sufficient, and it appears to me that the language admits of no construction or practice which shall fail exacting the entire complement of days in the publication of these notices. It seems intended to exclude the supposition that any other than a continued notice for the required number of days was allowable. If any number of insertions, less than the whole, will satisfy the statute, then a single one must have all the efficacy of a notice repeated from day to day, up to the period of sale. There is a difference between the rules of this Court and the Act of Congress, in respect to the number of days' notice required, the one prescribing six only and the other directing fifteen,—the statute regulating the proceeding only in cases of seizure by the United States,—but there is no ground for considering a full publication for the entire number of days required as less necessary under the one provision than the other. The rule of this Court adopts the direction of the statute as to the manner of publication, and not the period; and the reasonable construction of the rule and the act, and the one conducing to the preservation of good faith between suitors, and the rights and interests of all concerned in the ownership of vessels subjected to sale, requires that the notice of sale shall continue to be published every day, to the completion of the full number.

At least six publications of the notice were necessary, and as five only were made, the sale must be set aside. The claimants are also let in to defend the action upon its merits. No costs are awarded to either party against the other.

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HOLMES v. DODGE.

Where the respondent, in an action for a seaman's wages, relies upon a payment made in advance to the shipping agent by whom the libellant was shipped, the burden of proof is upon the respondent to show affirmatively, not only that the payment was made, but also that the shipping agent was authorized by the libellant to receive it.

Where, upon reference to a commissioner, there is a conflict of testimony upon a question of fact, the Court will adopt the conclusion of the commissioner, unless there is a palpable preponderance of evidence against it.

As a general rule, a reference to a commissioner, in a suit for wages, is a regular and necessary step on the part of the libellant, incidental to the prosecution of the action, and cannot be the subject of an independent charge in a bill of costs.

Where, however, the reference is solely for the benefit of the respondent, the Court will modify the order of reference so as to require the extra costs incurred to be defrayed by him.

Such modification must be asked for on obtaining the order of reference.

Under Rule 3 of the Supreme Court, the principal and his surety on the bond or stipulation given upon an arrest *in personam*, stand upon the same footing.¹

The award which grants execution upon a final decree, authorizes it against all parties embraced in the decree; and there is no necessity of special notice to the surety of respondent of an application for an execution against him.

THIS was a libel *in personam*, by Allen Holmes against A. P. Dodge, master of the brig Magdala, to recover wages earned on board the brig.

The libel claimed wages for one month and twenty-eight days' services, at \$18 per month. The claim was admitted by the answer, which set up as a defence the following items of payment:—

Cash advanced to libellant or order,	\$18 00
Advances before sailing, in clothing, &c.,	10 20
Hospital money,	65
Cash paid to libellant's proctor,	5 95
	<hr/>
	\$34 80

¹ Compare, also, the case of *Gaines v. Travis*, decided in this Court in January, 1849, and reported, *post*, in its order of date.

On the hearing, no evidence was offered to show the first, third, or fourth payments. Evidence of articles of clothing furnished, without showing prices, was given. The Court decreed in favor of the libellant upon his claim, and referred it to a commissioner to report the amount due.

On the hearing before the commissioner, the following facts appeared. One Anderson, keeper of a sailors' boarding-house, had previously shipped a man on board the *Magdala*, who deserted before the ship sailed. This man was indebted to Anderson. Upon his desertion, Anderson caused the libellant, Holmes, to be arrested and taken on board the vessel, and he was there induced to sign the shipping articles. The sum of eighteen dollars was paid to Anderson, which constituted the first item of payment above stated; but there was a conflict in the testimony of the two witnesses examined upon the question, whether this payment was made with libellant's consent or without it.

The commissioner adjusted the libellant's claim at \$34.80; and upon other evidence before him, allowed the first, third, and fourth items of payment claimed, amounting to \$16.80. But he rejected the item of \$18 paid to Anderson under the circumstances already mentioned, and reported that that sum was still due to the libellant.

The respondent filed exceptions to this report.

E. C. Benedict, in support of the exceptions.

I. The payment of one month's wages in advance is to be presumed, it being the uniform custom to make such payment.

II. The shipping articles recite a payment of the advance.

III. The witness Pike testifies that he saw the money paid to Anderson, and that it was so paid by the express direction of libellant. This testimony is, upon the whole, confirmed by that of Morris.

Alanson Nash, in opposition, contended that there was no

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sufficient evidence to show that Anderson was authorized by Holmes to receive the payment of his wages.

BETTS, J. I think the decision of this case depends upon the comparative credit to be given to the witnesses Pike and Morris.

Pike states that he saw the advance of \$18 paid to Anderson, and that the libellant told witness that Anderson was to receive it for him. Morris says that he was present, and that no money was paid to Holmes, or directly for him; and that the money collected by Anderson was the advance to be made to the seaman in whose place libellant shipped.

The story, as told, raises a strong presumption that the landlord, Anderson, undertook to make the advance payable to the libellant satisfy a like sum which he, Anderson, expected to have received of the other man he had shipped, but who deserted, probably in his debt to that amount. He fails, however, to prove that Holmes directed such application of the money, or that he consented that the previous advance of that sum, if made to Anderson on account of the deserter, should be charged to him and be regarded as his advance.

It is highly probable, upon the confused statement given of the transactions, that Holmes stood in Anderson's debt, and if his advance passed, with his consent, into Anderson's hands, that it would all have remained there. But the accounts between these two men are not to be settled in this action, nor are the facts sufficiently stated to enable the Court to say, with confidence, where the probable equity is. It is, however, clear, that the law casts upon the respondent the burden of showing the payment of the advance to libellant, or to his authorized agent; and that if a payment to a third person on behalf of the libellant is relied upon, the authority of such third person to receive the payment in the name of the libellant must be affirmatively shown. And as at best, the testimony is balanced on this point, the respondent must fail in this defence.

Independently of that consideration, it is not usual to reverse the judgment passed upon matters of fact by a tribunal or officer, having had opportunity for a personal examination of witnesses in each other's presence. A Court, reviewing the evidence as reproduced upon paper, possesses but imperfectly the means of determining the relative credit of witnesses who stand in conflict as to facts; and it is always safer, when the preponderance is not palpable, to rely upon the discrimination and conclusions made by those who have seen and heard the witnesses, face to face, than to attempt to settle that point by weighing the written report of the testimony.

Upon both of these considerations, I shall adopt the decision of the commissioner as to the advance due to the libellant, and shall hold that the exceptions are not sustained.

The decree will therefore be as follows:—

Exceptions to the report of the commissioner having been taken in this cause on the part of the respondent, and it appearing to the Court that the testimony before the commissioner, on the point in controversy, was in direct conflict, and that on a personal examination and hearing of the witnesses, he gave credit to one witness and discredited the opposing witness, and it not appearing that the collateral facts or circumstances afford just and satisfactory cause for changing the decision of fact made by the commissioner:

It is ordered by the Court, that the exceptions taken to the report filed in this cause be disallowed and overruled, with costs to be taxed.

The cause came up again soon after, upon an appeal taken by the respondent from the taxation of costs by the clerk, under the above decree. The libellant had charged and procured to be taxed a bill of \$17.25, for costs of reference, independent of the \$12 allowed the libellant in summary causes by the standing rule of Court. *Dist. Ct. Rules*, 165, 176. The respondent appealed from that taxation.

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BETTS, J. As a general principle of practice, a reference to a commissioner in suits for wages is a regular and necessary step on the part of the libellant in the prosecution of the action. The Court rarely takes the account between the seaman and the ship to determine the amount due, but as an ordinary incident to the suit, the computation is made by a commissioner, and if a reference were not moved for by the libellant, it would usually be directed by the Court as an essential proceeding in the cause.

It is undoubtedly true that instances may occur in which the reference is solely on the motion of the respondent and for his benefit, the claim of the libellant being definitely ascertained in amount by his proofs upon the hearing. In such cases the Court will, upon request, modify the order of reference, making it one granted in behalf of the respondent, and perhaps adding, also, in summary cases, a provision, that the extra costs incurred shall be defrayed by him. This is with the spirit of Rule 171 of this Court in respect to costs in summary actions, which imposes on the party obtaining a privilege the special costs created thereby.

The present case was one in which such a qualification of the usual order would have been proper, had it been asked for at the time the order was granted. Upon the minutes, however, the order now appears to have been moved for and taken in the usual mode; and under such circumstances, in my judgment, the libellant is only entitled to a single bill of costs, and such bill, in summary actions, is limited to \$12, exclusive of disbursements. *Dist. Ct. Rules*, 176. The reference, like an assessment by the clerk or jury of inquiry in common-law procedures, becomes an incident to the cause, to be charged for as an item in the general bill of costs. There is nothing before me in these proceedings which will justify treating this case as an exception to the general rule, and the objection taken to the allowance of the expenses of the reference, independent of the costs of the cause, must accordingly prevail.

The cause came before the Court for the third time, a few days later, upon a motion for execution against the stipulator, based upon an affidavit of one of the proctors, that execution on the final decree had issued against the respondent, and had been returned unsatisfied.

Alanson Nash, for the motion.

W. R. Beebe, in opposition, contended that an order to show cause should have been obtained and served upon the stipulator, and that for want of such notice, this proceeding was irregular.

BETTS, J. The practice of the District Court, in such cases, has been well understood and settled, under the standing rules of the Court. *Betts's Adm. Pr.* 27. After final decree against the principal, an order may be taken, as of course, requiring the stipulator to fulfil his stipulation, or show cause in four days why execution should not issue against him. This order is to be served upon the proctor of the principal party, and if no cause be shown, pursuant to its direction, a summary decree is rendered, and execution awarded thereon against the stipulator. *Dist. Ct. Rules*, 145.

The rules of the Supreme Court place the principal and his surety upon bond or stipulation, given on an arrest *in personam*, upon the same footing. The engagement of the stipulator is, that the principal party shall appear in the suit and abide by all the orders of the Court made in the cause, whether interlocutory or final, and that he shall pay into Court the money awarded by the final decree. And upon such bond or stipulation, summary process of execution may and shall be issued against the principal and sureties, to enforce the final decree so rendered. *Sup. Ct. Rules*, 3.

These stipulations may be taken by the marshal, or before a judge or a commissioner. *Sup. Ct. Rules*, 3, 5.

In the present case, the surety executed a bond to the mar-

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shal, pursuant to the terms of Rule 3 of the Supreme Court. The effect of the bond, and the remedy upon it, must accordingly be determined by the true import of that rule. It seems to me manifest that the Court designed by the rule to place the surety precisely in the situation of the principal, regarding his engagement a legal assumption of the responsibility of the respondent. The final decree is to be enforced against both, by summary process of execution, and accordingly, the method by which the process against the principal is obtained, is the proper one to be pursued in procuring it against the surety also.

As an order to show cause is not required in the District Court in respect to the principal, but execution is awarded by an order as of course, the distinction of procedure which before obtained in that Court in respect to the surety, is abrogated by this rule of the Supreme Court, and one order is all that is necessary. The same award which grants execution on the decree, grants it as respects all parties bound by it; and as that order may be summary, it of course may be founded upon the decree itself, without any intermediate steps or notice. The term *summary proceeding*, imports a step taken by the direct action of the Court, and unless regulated by some condition or qualification of law, it will be free from delay or formalities. As summary arrests and summary judgments or decrees are, in contemplation of law, independent of the checks and formalities attendant upon ordinary proceedings of like character; so, also, a summary execution must be considered as the immediate award of that process after final decree rendered, and as subject to no other condition than that it be directed by the Court.

The rule of the Supreme Court is not limited to the granting a power to give summary execution as a favor; it is imperative upon all the courts. They are required to issue the process against principal and sureties to enforce the final decree.

The Flash.

The libellant is accordingly now entitled to that process upon this motion. He ought, however, to have taken the order for it together with that obtained against the principal, and the order now made must be without costs.

THE FLASH.

The master of a New York vessel contracted, at the port of New York, to transport a cargo across the East River to Brooklyn,—a voyage less than a mile in length, but across tide waters. He took a part of the cargo on board, but afterwards refused to take on the residue, or to deliver that already laden.

Held, That an action *in rem* would lie both for the refusal to receive on board and the refusal to deliver; notwithstanding that the contract was made in the home port, and for a voyage of so local a character, and notwithstanding that only a portion of the goods were received on board.

By the general law maritime, the vessel is bound to the shipper for the performance of a contract of affreightment made with the master, whether by charter-party, by bill of lading, or by parol.

THIS was a libel *in rem*, by William Churchill against the schooner Flash, to recover damages for the non-fulfilment of a contract of affreightment.

The libel alleged that an agreement was made by the master of the schooner with the libellant, to take on board the vessel, at her wharf in this city, a cargo of bricks, thirty-five thousand in number, and to transport them over tide waters,—namely, across the East River to the city of Brooklyn,—for a stipulated freight; that the vessel received on board eight thousand of the bricks; that the master had refused to deliver such part to the libellant, pursuant to the shipping contract; and that he left on the wharf in the city of New York the residue of said cargo, which had been delivered there by the libellant, ready to be taken on board, and had refused to receive and transport them according to the contract of affreightment.

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The claimant, who was the owner of the vessel, demurred to the libel upon two grounds:—

1. That the Court had not jurisdiction to enforce, *in rem*, an agreement to take and carry freight.

2. That the master of a domestic vessel had no authority to bind her while in her home port, upon a contract like the one here set up.

The cause now came before the Court on the demurrer.

T. B. Scoles for claimant.

I. The ship is tacitly hypothecated for the obligations contracted by the master, only "when acting in the quality of master, and within the scope of his authority as such." The jurisdiction of the Admiralty to proceed against the ship in specie, on the ground that she is security for the merchant who lades goods on board, is altogether denied in England. *Abbott on Shipp.* 161. It is recognized here under certain restrictions, but conceded to be "entirely due to modern invention." The Rebecca, *Ware*, 200. But all the cases upon this subject are for injuries done to the cargo during the voyage. *Cleirac*, c. 58, 63, 259. See the cases collected in *Abbott on Shipp.* ed. 1846, 161, note. No lien exists for a refusal to take the merchandise on board the ship, nor for a refusal to perform the voyage after the merchandise has been taken on board.

II. Conceding that the vessel could be bound for damages arising from a refusal to perform a contract to convey goods, this libel does not show a contract binding upon the owners; and it is only a contract binding upon the owners which creates a lien upon the vessel. The Waldo, 4 *Law Rep.* 382; The Casco, *Ib.* 471.

1. The libel alleges a contract to transport a quantity of bricks, made with the master, in the home port of the owner, which "is not incident to his general authority as master, nor can it be presumed, under such circumstances, as an ordinary superadded agency." The Schooner Tribune, 3 *Sumn.* 150.

2. There is, moreover, no allegation in this libel that the contract was made with the knowledge or consent of the owners, nor are any circumstances shown from which the inference can be drawn that it was with their approbation, or that he had any authority to make it, or that they subsequently assented to it. On the contrary, the libel expressly avers that the owners dissented, and refused to affirm or perform the contract alleged to have been made with the master; this is the very *gravamen* of the complaint.

William Jay Haskett, for libellant, contended that the vessel was bound *in rem*, both by the failure to deliver the portion of cargo taken on board, and for the failure to perform the contract as to that which was not taken on board. *Abbott on Shipp.* 161, and notes; *The Rebecca, Ware*, 189, 193; *The Phebe, Ib.* 263; *The Paragon, Ib.* 322; *The Volunteer*, 1 *Sumn.* 551; *The Reeside, Ib.* 567.

BETTS, J. By the maritime law, an affreightment of goods on board a vessel operated reciprocally as a tacit pledge or mortgage of the vessel to the shipper for the conveyance and delivery of the goods according to the contract, and of the goods themselves to the ship to secure payment of the freight earned. *Abbott on Shipp.* 160; 3 *Kent*, 162. The lien to the shipper arises alike, whether the contract of affreightment be by charter-party, by bill of lading, or by parol. This principle is fully discussed in the case of the *Rebecca, Ware*, 88. That case shows very satisfactorily that the obscurity which is to be found in the English system of Admiralty law upon this subject is attributable, not to any doubt of the existence of a lien upon the vessel for the performance of the contract of affreightment, but to the fact that the courts of common law in that country have assiduously interposed to restrain the Court of Admiralty from taking cognizance of the contract. And by a full examination of the continental authorities, both ancient and modern, it is shown to be an estab-

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lished principle of the general law maritime, that the vessel is liable *in rem* for the performance of the contract of affreightment entered into by the master. See, also, *The Phebe, Ware*, 263; *The Paragon, Ib.* 322. These views are fully supported, so far as relates to foreign voyages upon the high seas, by other authorities, which clearly show that the hiring of the vessel, or of any portion of her for a voyage, or an agreement for transportation of goods by her upon the high seas, binds her to the fulfilment of the contract, and this, whether it be evidenced by charter-party, by bill of lading, or by verbal agreement only. *The Volunteer*, 1 *Sumn.* 551; *The Reeside*, 2 *Ib.* 567; *The Tribune*, 3 *Ib.* 144; *The Waldo*, 4 *Law Rep.* 382; *The Casco, Ib.* 471.

This principle does not require, as was contended by the counsel upon the argument, that the goods should actually be on board the vessel, to raise the lien. There are, indeed, many classes of liens which rest upon possession, actual or constructive, as their basis. If the basis of a lien claimed upon such contract rested in a figurative possession of the vessel, imparted to the shipper by lading his goods on board, there would be force in the argument, that no lien was acquired until the actual lading of the goods was accomplished. But such is not the principle from which the liability of the vessel is deduced. It is grounded upon the authority of the master to contract for the employment of the vessel, and upon the general doctrine of the maritime law, that the vessel is bodily answerable for such contracts of the master made for her benefit.

Had the undertaking, then, in this case, been for affreightment to the West Indies or to New Orleans, the case would have come within the doctrine of the maritime law, clearly established by the decisions and elementary writers—the contract being a positive contract of affreightment, and not a mere agreement leading to such contract.

It is contended, however, that the present case does not

come within the scope of the doctrine above laid down, for the reason that the contract was entered into by the master on behalf of the vessel, at her home port, where, it is urged he has no power to bind the vessel by any such agreement.

The authority of the master, at her home port, to make engagements for a vessel in the course of her ordinary employment, is always implied. To relieve the vessel from responsibility upon such engagements, the dissent of the owner must be shown. *Curtis's Merch. Seam.* 168; *Abbott on Shipp.* 156, 159, and note; *The General Interest Insurance Company v. Ruggles*, 12 *Wheat.* 400. It is true that this presumed authority has been said not to extend so far as to authorize the master to make a charter of the vessel at her home port. *The Tribune*, 3 *Sumn.* 144. But if this distinction is sound, it does not affect the application of the principle to the present case, which is a contract to receive and carry cargo under the charge of her master, and not a letting of her out of his possession. If, therefore, this had been a sea-going vessel, and the contract had related to a foreign voyage, the authorities would, in my opinion, leave no ground on which the claimant could contest the liability of the vessel, as well for the refusal to take on board the portion of cargo left behind as for the failure to deliver that which she carried out.

The controversy upon this point is no doubt induced by the peculiar character of the undertaking of the master and of the employment of the vessel. She was, it seems, engaged in the carriage of cargoes from the city of New York to landing places at the city of Brooklyn, running merely across the river or bay, and probably making no trips exceeding a mile in distance. The pleadings, however, present the facts that this was a contract for a maritime service, to be performed by a vessel upon tide waters, and that the master having taken on board a part of the cargo, refused to receive the rest, and

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also detains on board and refuses to deliver, according to the contract of affreightment, the portion taken on board.

The distance of transportation or the danger of navigation is nowhere declared an element essential to the liability of the vessel upon a contract of affreightment.

An undertaking to carry a cargo to ports or places up the Sound, or to Staten Island or Rockaway, would be subject to the same objection. Neither of these trips would be a foreign voyage. The decisions upon this subject rest upon principles which render them applicable as well to that species of carriage as to any other kind of coastwise navigation. In this Court it has been repeatedly decided, that vessels engaged in navigating the Sound, or the tide waters of the harbor, or of the North River, have become subject to the rules of maritime laws, applicable to those engaged in voyages to other States or upon the high seas. This may be regarded as in effect determined, in the recent decision of the Supreme Court of the United States. *Waring v. Clarke*, 5 How. 441. And it is understood, that in so far as the jurisdiction *in rem* of the Admiralty courts is concerned, that Court also held, in the case of *The New Jersey Steam Navigation Company v. The Merchants' Bank of Boston*,¹ (argued at the same term, but ordered to re-argument upon the question of jurisdiction *in personam*,) that Admiralty jurisdiction, in cases of contract, is not determined in this country as in England, by the mere matter of locality, but obtains wherever the subject-matter of the contract is of a maritime character.

Upon these grounds I think that the libel, upon its face, shows an adequate cause of action *in rem*. The demurrer is accordingly overruled, with costs.²

¹ Since reported, 6 How. 344.

² The cause came again before the Court, for final hearing, in January, 1848, and the proceedings then had are reported, *post*, under that date.

THE MOXEY.

An injury received by a vessel at her moorings, in consequence of being violently rubbed or pressed against by a second vessel lying alongside of her, in consequence of a collision against such second vessel by a third one under way, may be compensated for under the general head of collision, as well as an injury which is the direct result of a blow properly so called.

But to entitle the injured vessel to recover against her stationary neighbor, under such circumstances, instead of against her who was the original cause of the accident, such stationary vessel must be proved to have been in fault.

The rule of mutual contribution is not applied to cases of accidental collision from physical causes for which neither vessel is to blame; but each vessel in such case must bear her own loss.

THIS was a libel *in rem*, by Abner and John H. Davis, owners of the barge New London, against the brig Moxey and the schooner Avenger, to recover damages for a collision between those vessels and the New London.

The libel stated, that on November 19, 1846, the barge New London, owned by libellants, was lying in one of the slips in the port of New York, engaged in delivering her cargo, and that she was well secured to the wharf, well manned, &c. That on the same day, the schooner Avenger lay at the end of the pier to which the New London was secured; and the brig Moxey lay within the slip, alongside of the New London, and quartering on her bow, and was fastened to the pier by one line from the bow, another line from the stern, which latter line passed across the New London, and by a third line fastened to the New London. That during the night a storm arose, and the Avenger, being carelessly and negligently fastened to the pier, broke loose from her moorings and floated around into the slip and alongside of the Moxey. That the Moxey, being negligently and carelessly fastened to the wharf, and, in particular, not having a line carried to the pier on the opposite side of the slip, as in such weather she ought to have had, was, by the collision of the Avenger,

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driven against the New London, whereby, and by being thrown up and down between the brig and the wharf, by the surging of the water, she received much damage.

The answer denied all the charges of carelessness or negligence; and averred that the Moxey was well manned and well and properly secured; and that she had taken the position occupied by her at the request of those in charge of the New London, to accommodate them in delivering her cargo; and that every means was taken at the time of the collision by those in charge of her, to avoid injuring the New London. The answer also charged, that the New London was old and decayed, and that any injury which she suffered was ascribable, not to any neglect or want of care or skill on the part of the master and crew of the Moxey, but to her own decayed and unsound condition.

The libel was originally filed against both the Moxey and the Avenger; but upon exceptions taken to the libel, it was held by the Court, that inasmuch as it was not charged in the libel that the collision complained of was the joint act of the two vessels, or that it was made by them at the same time, or that they were under charge of the same crew or persons, or that the injury inflicted was upon the same part of the vessel of libellants, the libellants were not entitled to proceed against the two vessels conjointly in one action, but must elect to sue either the Moxey or the Avenger. In pursuance of this decision, the suit was discontinued as against the Avenger, and the libellants proceeded against the Moxey alone. The cause now came before the Court upon the proofs taken against her.

So far as the decision of the case turned upon matters of fact, the opinion of the Court shows how far the respective allegations of the parties were regarded as sustained by the proofs.

S. P. Nash, for libellants.

I. By the general principles of maritime law, the vessel

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having the greatest facilities of movement is regarded as guilty of negligence if she does not employ those facilities for the protection of other vessels. *Story on Bailm.* §§ 611 and 611 *b*; *Abbott on Shipp.* 234. Here the Moxey lay outside and was moved by sails. The barge was a tow-vessel, having no self-moving power; and she moreover lay inside, where she could not be moved out of danger. She was also the weakest vessel. Under such circumstances, the burden of proof is thrown upon the Moxey, to free herself from the presumption of negligence; and it does not devolve upon the New London to prove her guilty of it.

II. The fact that the New London was unsound could have no bearing on her *right* to an indemnity; it could only affect the amount of damages. A vessel has a right to be protected in her lawful position, whether she is sound or unsound.

Edwin Burr, for the claimants.

I. This is not a case of collision. That term always implies a movement of one vessel through the water, and a striking against another, causing injury to her. 2 *Condy's Marsh. Ins.* 431. The barge, in this case, was moved up and down by the surging of the water, and was thus injured. The damage in no way resulted from any fault or negligence in navigating the Moxey.

II. *Primâ facie*, the injury is from the act of God, and the libellant must show a strong case of fault in the claimants, to rid himself of this conclusion and render the brig liable.

III. In ordinary cases of collision, the libellant must be held to strict proof that the injury was caused by a breach of some nautical rule or usage on the part of the crew of the brig, or some want of ordinary nautical skill, without such breach or neglect on the part of the libellants. *Story on Bailm.* § 611. In all cases of collision, the libellant must prove that the injuries complained of resulted from the fault of the defendant, there being no want of ordinary care on his own part. *Abbott on Shipp.* 238.

IV. It is the Avenger which is chargeable with responsibility for the collision.

BETTS, J. This clearly is not a case of collision within the nautical acceptation of that term, which imports the impinging of vessels together, whilst in the act of being navigated. Common usage, however, applies the term equally to cases where a vessel is run foul of when entirely stationary, or is brought in contact with another by swinging at her anchor. *Jacob. Sea L.* 326, note; 1 *Condy's Marsh. Ins.* c. 12, § 2; *Abbott on Shipp.* 238.

A loss under the circumstances of the present case is, moreover, a loss from the peril of the sea, (1 *Phill. Ins.* 249,) and it falls also within the class of losses adjusted, under many maritime codes, by mutual contribution of the vessels injuring and receiving injury. Thus Weskett says: "When two or more ships are *lying at anchor*, and another, in what manner soever it may happen, is in danger of coming too near, the master who lies foremost shall, if he can, make way, and be obliged, at the other's call, to weigh anchor and remove; in failure whereof, he shall be answerable for whatever damages may ensue, especially if happening in a harbor where the water may ebb away and the ship be aground;—in case he who in this manner endeavors at the other's call to make way, shall receive any damage in ship or goods, he shall be indemnified by the other according to arbitration; but if in making way he shall happen to do any damage to the other ship or goods, he shall not be answerable for it. *Weskett on Ins.* tit. Running Foul.

I do not think that the term collision, as used in the maritime law, is to be construed with the absolute strictness contended for by the claimant's counsel. An injury received by a vessel from being violently rubbed by another, or pressed by her with force against a pier or wharf, as in this case, may, I am inclined to think, be recovered for in Admiralty

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under the general charge of collision, as well as where the injury is derived directly from the headway of a vessel under navigation, or drifted against her.

But conceding that this description of injury, whether technically a case of collision or not, is still one for which the libellants could sustain an action *in rem*, I do not think the particulars essential to the support of such action have been established by the proofs.

The brig was placed alongside the barge at the request of those who had her in charge, and in such a way as to accommodate them in unlading cargo from their own barge into her. She was adequately secured in the mode usual in this harbor, and was manned and managed in her berth conformably to the usage of the port. The injury inflicted occurred during a violent gale of wind arising suddenly in the night. Whether that injury was occasioned by the swell of the waves rubbing the two vessels together as they were lifted up and down, or whether the *causa causans* was the drifting of another vessel, which had broken loose in the gale, against the brig, neither circumstance affords ground for imposing the loss upon the brig. No fault is proved against her in taking the place she occupied, or in any thing done on board of her conducing to the injury of the barge.

It is asserted that there was blameable negligence on the part of the brig, in not placing fenders between herself and the barge, and also in omitting to carry a line across the slip to the opposite pier, so as to ease off the pressure against the barge.

As to the first particular, it is to be remarked, that the duty of using fenders between the two vessels was mutual and reciprocal, the brig being by law equally entitled with the barge to the berth she occupied, and not bound to do more than the other vessel for their common protection. But there is proof that the brig had a competent supply of fenders, and used them on each side of her till they were broken up by the

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jamming of the two vessels in the severity of the storm. Indeed, the evidence renders it quite probable, that the efforts to protect the barge in this way led to her injury, as it would seem she was principally damaged at the points where fenders had been placed against her.

In regard to the second point, wherein it is asserted that the brig was culpably negligent in omitting to carry a line to the opposite pier, the city ordinances prohibit running lines in this manner across the opening of slips; (*Ord. of N. Y. City*, 1839,) but if it had been lawful to use one in the emergency of the case, it was as much the duty of the libellants as of the claimants to take that precaution. This was not a common culpable act, conducing to the collision, but a mutual omission to do an act on shore which might have prevented or lessened the injury, and neither party can make the other responsible to him for such an omission.

Two circumstances are to be regarded :—

1. The brig was entitled by the law of the port, to the berth she occupied; she had entered it without injuring the barge, and was secured there by the usual and competent fastenings. When, therefore, the peril of this storm came upon them, the barge had no right to require the brig to leave the slip, or to change her position, unless it be clearly shown that the change could have been made at the time and under the circumstances, without hazard to her.

2. The Avenger, another vessel, was driven from her fastening and into this slip against the brig by the gale; and as the wind crowded her directly upon the brig, and thereby increased the pressure of that vessel against the barge, the damage incurred by the latter would be attributable to the Avenger, her action being the direct cause of the injury. In legal contemplation, she was in fault in taking a berth in an insecure place, or in not using fastenings sufficient to hold her there, and adequate to protect her from being driven off by the storm.

The brig has no connection with that fault; and in so far as she participated in the injury inflicted upon the barge, the collision was by *vis major*, without negligence or blame on her side, and the loss must be borne where it falls. 3 *Kent*, 231.

Although the rule of mutual contribution may be adopted by our courts in cases of loss by collision at sea or in port, occurring by accident or through the mutual fault of both vessels, there would be no reason for applying it where there was no common fault, and where the management of the two vessels in taking their positions in relation to each other was by mutual agreement. On the contrary, where damage is incurred without fault on the part of either vessel, and by some irresistible force constituting a case of *vis major* or inevitable accident, the loss must be borne by the party upon whom it happens to fall, the other not being responsible to him in any degree. By the maritime law of both England and the United States, where a collision happens by inevitable accident and without fault of either vessel, each must bear the damage received by her, whatever it may be, and has no claim upon the other for contribution.¹ The *Woodrop Sims*, 2 *Dods*. 85; The *Catherine of Dover*, 2 *Hagg*. 154; The *Shannon and Placidia*, 7 *Jur*. 380; The *Ebenezer*, 7 *Jur*. 1118; S. C. 2 *W. Rob*. 206; *Reeves v. The Constitution*, *Gilp*. 579; The *Eliza and Abby*, 1 *Blatchf. & H*. 435; *Abbott on Shipp*. 238; *Story on Bailm.* § 608 and note 2; 3 *Kent's Comm.* 231.

In my opinion the action cannot be sustained, and the libel must be dismissed with costs to be taxed.

¹ This rule has since been laid down by the Supreme Court of the United States, in *Stainback v. Rac*, 14 *How*. 532. The same principle appears to be recognized in Scotland. *Tunes v. Class*, 4 *Murr*. 167. By the law of other maritime States, however, the aggregate damage to both vessels incurred through a collision for which neither was to blame, is apportioned equally between them.

The Zenobia.

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THE ZENOBIA.

Where there is no provision in the contract of affreightment varying the liability of the common carrier, he can only relieve himself from liability for injury to goods intrusted to him, by proving that it was the result of some natural and inevitable necessity superior to all human agency or control, or of a force exerted by a public enemy.

A delay of the master to present to the custom-house officers at the port of consignment a proper manifest, by which delay the owner of goods shipped on board is unable to pass them through the custom-house, is a neglect of his duty as a master, for which the vessel is responsible.

Where libellant contracted with the master in a foreign port for a passage to this country, and paid a part of his passage-money in advance, but the master failed to fulfil his contract, and libellant was obliged in consequence to take passage in another vessel,—*Held*, that the vessel was responsible for the fulfilment of the agreement; and that the libellant was entitled to recover from her the passage-money paid in advance, the expenses incurred by him in awaiting the sailing of another ship, and the sum paid by him to such second vessel for his passage in her.

THIS was a libel filed by Henry J. Carr against the bark *Zenobia in rem*, and also *in personam* against her master, A. R. Cronstadt.

The case was brought before the Court in July, 1847, upon a motion by the master to require the libellant to elect between the two remedies sought by him, and upon exceptions filed by the owner, as claimant, to the jurisdiction of the Court, and to the form of the libel. The decision of the Court upon the questions then raised, is reported *ante*, 48. The cause now came up for final hearing upon the proofs.

As the case was peculiar in its character, and as the libel was required to be reformed in its construction, and when reformed was prosecuted to judgment without further objection to its structure, the libel is now inserted in full.

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The libel of Henry J. Carr, of the city of New York, against the Swedish bark *Zenobia*, her owners, and Auguste R. Cronstadt, master thereof, in a cause civil and maritime of con-

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tract as against said vessel and owners, and of tort or damage against said master, respectfully shows :—

That for the last six years previous to the month of December last, your libellant has been a resident merchant in Hong Kong, China. That in the month of November last your libellant having determined to return with his family to the United States to reside, your libellant chartered, at Hong Kong, a "lorchar," or small schooner, at an expense of \$40, being the usual means and rate of travelling in China, and came down to Whampoa, a distance of some ninety miles, to secure a passage for your libellant and his family, consisting of a wife and infant child, to the port and city of New York. That on arriving at Whampoa your libellant found the Swedish bark Zenobia, whereof Auguste R. Cronstadt was master, the first vessel up for the port of New York from Whampoa; and thereupon, on the 14th day of November, 1846, your libellant shipped on board of said bark Zenobia eight cases of merchandise, seven marked L. E. C., Nos. 1, 2, 3, 4, 5, 6, 7, and one case marked F., No. 8, for which shipment the mate of said bark, H. Brandt, gave your libellant his receipt; also, three other cases of baggage and a chest of drawers, which contained the sum of \$2,500, for which cases said mate gave your libellant his receipt in the Swedish language. That after putting on board of said bark the wearing apparel of your libellant and his family, your libellant also paid, on the said November 14, 1846, to the said A. R. Cronstadt, master of said bark, the sum of \$150, as one half of the passage-money for your libellant and his family, from Canton to New York, and took from said master his receipt therefor. That the said master thereupon informed your libellant that said bark would not sail from Whampoa before the 1st of December following, and that he would advise your libellant, by letter, of the time of his sailing. That your libellant thereupon returned to Hong Kong for his family; and on the 21st day of November last your libellant received a letter from the

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said A. R. Cronstadt, dated the 18th of November, stating that he should sail with said bark from Whampoa on the 28th of November; and on the next day, the 22d of November, your libellant received another letter from said A. R. Cronstadt, dated the 19th, stating that he had written a letter on the 18th, but lest it might not have been forwarded properly, he repeated its contents, namely, that he should so sail from Whampoa on the 28th of November.

That thereupon your libellant got himself and family in readiness, and on the 24th day of November, left Hong Kong in a lorchar hired for the purpose, at the rate of \$60, for Whampoa, and arrived there early on the morning of the 27th of November. That not seeing said bark in the river and your libellant being informed she had sailed the day previous, namely, the 26th of November, your libellant leaving his family on board of the boat which brought them from Hong Kong, immediately hired a small boat, and proceeded to Canton to see Messrs. McLean, Deane & Co., the agents of the owners of said bark, and consignees in Canton.

That upon arriving at Canton, your libellant learned from the said house of McLean, Deane & Co., that said bark had sailed from Whampoa, on her voyage to the port of New York, on the 26th day of November, two days previous to the time said master had informed your libellant he should sail. That, as your libellant was informed by said firm, said master, after the 14th of November, informed them there were no passengers to go out in said bark. That at the request of your libellant, the agents and consignees of the owners of said bark, Messrs. McLean, Deane & Co., wrote a letter to the said master by your libellant, directed to him in New York, dated November 30, 1846, in which they say, among other things:—"We have perused your letters to Mr. Carr, at Hong Kong, wherein you informed him that you would not sail from Whampoa for New York until the 28th inst.; and as Mr. Carr kept his time, and was at Whampoa on

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the day you named, we consider that he has not in any way forfeited his right to a passage for himself and family to New York, as agreed between you and him, as per your receipt."

That in addition thereto, your libellant was also informed at Canton, by Mr. John N. Griswold, that said bark sailed on the 26th of November from Whampoa, and that on the 14th of November the said captain, A. R. Cronstadt was informed that he would be required to sail on the 25th of November.

And your libellant further shows, that on his return to Whampoa, the only vessel then lying in the river of Whampoa, bound for the port of New York, was the ship Rainbow, which was to leave about the 3d of December following. That said bark Zenobia having on board all the property, money and effects of your libellant, together with the wearing apparel of your libellant and his family, your libellant was left at Whampoa wholly destitute, and was obliged to negotiate bills of exchange at an enormous rate of exchange, in order to raise funds to provide your libellant and his family with proper outfit at that season of the year for a voyage to the United States, which cost your libellant \$423, and to pay for his passage on board of said Rainbow, which was, under the circumstances in which your libellant was placed, fixed at \$400. That your libellant was therefore obliged to borrow \$1,000, at the rate of 50 per cent. upon the bills of exchange of your libellant, at three and four months, payable in the city of New York. That your libellant was obliged to incur an expense of \$16 in going to and from Canton to Whampoa, to arrange for the passage of himself and family in the Rainbow; and during which time the detention of the lorchar in the river at Whampoa, on board of which was the family of your libellant, from the said 27th day of November to the 3d day of December, on which day your libellant went on board of said Rainbow, cost your libellant the further sum of

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\$64, there being no hotel or house of entertainment at Whampoa, and he consequently being obliged to remain in the boat in the river, until they could go on board ship.

That your libellant arrived in the port of New York, in the ship Rainbow, on the 1st day of March last, with his family, and finding that said bark Zenobia had not yet arrived, and your libellant being a stranger in the city, and destitute of the means of immediate support, in order to borrow a small sum to supply the current wants of your libellant and his family, your libellant was obliged to effect insurance on his property in said bark Zenobia, at an expense of \$61, and to assign the policy to the party loaning your libellant the sum so required.

And your libellant further shows, that said bark Zenobia arrived in the port of New York on or about the 9th day of May instant; and on or about the 10th instant your libellant saw said A. R. Cronstadt, who appeared surprised, and said to your libellant, "I thought you were in China yet." That your libellant thereupon requested the said master of said vessel to return to your libellant the money he had so advanced, and to repay your libellant the money and expenses he was put to in Whampoa by the detention of libellant, in consequence of the violation of said contract and undertaking of said master in relation to the transportation of your libellant and his family to the United States. That said master set your libellant at defiance, and told your libellant to get redress as he best could.

And your libellant further shows unto your honor, that said master, following up the great injury and damage so as aforesaid done to your libellant, on the arrival of said bark Zenobia in the port of New York, has refused to make the proper entry of the merchandise and effects shipped by your libellant on board of said bark at Whampoa, on the manifest or proper exhibit of the cargo of said bark at the custom-house in the city of New York, thereby preventing your libellant or his

consignee from obtaining the property and effects of your libellant from said bark, or the public store, should they be left there; the only entry on said manifest or exhibit in relation thereto, being as follows: "1—8 to order," meaning packages No. 1 to 8 to order, said master refusing to enter the name of your libellant as shipper;—it being customary and requisite to enter on said manifest or exhibit the numbers and marks of the several packages, the name of the person shipping them, and the name of the consignee, if consigned, as was the case with the whole of the cargo of said bark Zenobia on her said voyage, except the property and effects of your libellant; the entry of which, as above stated, was without marks and without the name of any person as shipper or consignee. That said master utterly refused to make any other entry, although informed by the Collector of the port of New York, or his agent, that he is liable to a penalty of \$500 for not so doing,—the said master, A. R. Cronstadt, at one time pretending that he does not know your libellant and never saw him before,—at another time, as your libellant is informed, alleging that your libellant came to him at Whampoa destitute, and tried to beg a passage for himself and family to the United States, all of which said master knows to be totally untrue.

That when the several cases of merchandise were shipped on board said vessel, they were marked as herein stated, and the receipt of the first officer of said bark taken therefor. That at the same time, on the 14th of November, your libellant took blank bills of lading to said master, and requested him to fill them out; he being unwell, your libellant left them on his table, said master saying he would have them made out and hand them to your libellant when he came on board the vessel—the receipts of said first officer of said bark being the only evidence of such shipment left with your libellant. That the value of said merchandise, wearing apparel, and money so shipped, was at least five thousand dollars.

And your libellant further shows, that your libellant offered to produce and exhibit to said master in the custom-house, on his pretending he did not know your libellant, his letter to your libellant, written at Whampoa to your libellant at Hong Kong, with the Chinese postmark thereon; also the original receipts of his first officer of said bark, for the cases of merchandise and luggage so shipped, but the said master refused to see them, or pay any attention thereto. All of which actings and doings of said master have been and are oppressive and unjust towards your libellant. That said vessel is a foreign vessel, and is now lying within the jurisdiction of this Court, and as your libellant is informed and believes, carried freights on her said voyage which have not yet been paid over to the owners or their agents, to something like eight thousand dollars.

And thereupon your libellant alleges and articulately propounds as follows :

First.—That on or about November 14, 1846, your libellant shipped on board the said bark Zenobia, then lying at Whampoa, (China,) for transportation to the port and city of New York, eight cases of merchandise, duly marked and numbered, and also three other cases of luggage, with a chest of drawers, which contained the sum of \$2,500; taking the receipt of the mate of said bark for said last mentioned cases.

Second.—That on the same day your libellant contracted with the master of said vessel to convey your libellant and his family to the city of New York, and paid the master of said bark \$150, as one half of the passage-money therefor.

Third.—That in coming down from Hong Kong to Whampoa with said merchandise, to ship the same to the United States, your libellant incurred the expense of \$40.

Fourth.—That after shipping said merchandise on board of said bark, and after the payment of said sum of \$150 to said master, on account of the passage of your libellant and his family to New York, your libellant returned to Hong Kong

for his family, under the assurance of the master of said bark that she would not sail before the first of December ; and that he would advise your libellant in time of the day of sailing of said bark from Whampoa.

Fifth.—That on or about the 22d day of November last, your libellant received a letter from the master of said bark, dated the 19th of said month, stating that he had written a letter on the 18th to your libellant, but lest it might miscarry, he repeated its contents, viz. : that he should sail from Whampoa on the 28th of November.

Sixth.—That on the 24th of November your libellant and his family left Hong Kong, and arrived at Whampoa on the morning of the 27th of November last, and found said bark had sailed from Whampoa the day previous, to wit, the 26th of November.

Seventh.—That the expense incurred by your libellant in coming down from Hong Kong to Whampoa with his family to go on board of said bark was \$60 ; and the necessary and additional expense by reason of his detention until the sailing of the next vessel to the United States, the further sum of \$64, besides the sum of \$16 paid by your libellant in going to Canton to see the agents of said bark.

Eighth.—That the master of said bark was, on the day of the shipment of said merchandise on board of said bark by your libellant, to wit, the 14th of November last, and some days previous to the date of his letter to your libellant of the 19th of November, duly notified that said bark would sail on the 25th of November ; and said master well knew that said bark would sail before the 28th of November last.

Ninth.—That by the misconduct of said master, your libellant and his family were, on the 26th day of November last, after the shipment of all the merchandise, money, and wearing apparel of your libellant on board of said bark, and the payment of one half their passage-money to the United States, thereby left in Whampoa wholly destitute.

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Tenth.—That your libellant was obliged to raise \$1,000, by drawing bills at an enormous rate of exchange, to wit, fifty per cent. premium.

Eleventh.—That your libellant was, in consequence of being so left destitute as to wearing apparel for himself and family, obliged to expend the sum of \$432 for a new outfit.

Twelfth.—That your libellant, in securing a passage for himself and family by the first vessel from Whampoa to the United States, was obliged to pay \$400 therefor.

Thirteenth.—That upon the arrival of your libellant in the United States in March last, before the arrival of said bark with the effects of your libellant, your libellant was obliged to effect an insurance upon his property at an expense of \$61, in order to borrow a small sum for the immediate wants of his family.

Fourteenth.—That said bark Zenobia arrived in the port of New York on the 9th day of May last; and said master, upon being called by your libellant to refund the passage-money so paid him in Whampoa, with the money and expenses incurred by your libellant in consequence of being left in China, said master wholly refused, and set your libellant at defiance.

Fifteenth.—That said master, A. R. Cronstadt, after his arrival in New York with said bark, interposed every obstacle in his power, and endeavored to defeat your libellant from obtaining his merchandise and effects so shipped by said vessel, by refusing to enter the same on the manifest of the cargo of said bark with their marks and numbers; and also by refusing to enter the name of your libellant therein as the shipper of said merchandise and effects, to the great damage and injury of your libellant.

Sixteenth.—That the value of said merchandise, wearing apparel, and money, shipped on board of said bark by your libellant, was at least five thousand dollars.

And your libellant therefore charges, that said breaches of

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the undertaking and contract of said bark Zenobia and her master, to and with your libellant, are properly cognizable and relievable in this Court of maritime jurisdiction. And your libellant therefore prays the aid of this honorable Court, that process maritime may issue against said bark, her tackle and apparel, as well as against her owners and all persons interested therein, pursuant to the practice of Courts of Admiralty and maritime jurisdiction ; and that an attachment *in personam* may issue against said master, A. R. Cronstadt, and that said bark, her owners, &c., may be by this honorable Court decreed to pay to your libellant the money paid to said master on account of said voyage, for the passage of your libellant and his family, together with the damages sustained by your libellant, and the money and expenses necessarily and properly incurred by your libellant in China, by reason of said breach of the contract and undertaking of said master and bark with your libellant, and of all loss and damages sustained by your libellant therefrom, as well also by reason of the refusal of said master to deliver or make the proper entries of the merchandise and effects of your libellant in the custom-house of the port of New York, thereby preventing your libellant from receiving the same ; and for such aid and redress against said bark, her owners, or the said A. R. Cronstadt, the master, as the Court is competent to give in the premises. And that said bark, tackle and apparel, owners, and all interested in her, may be decreed also to pay to your libellant the costs of this suit.

And your libellant will ever pray.

VERIFICATION.

To the libel, as amended, A. R. Cronstadt, the master, and David Carnigie, owner and claimant, interposed separate answers.

The answer of Cronstadt, the respondent, denied nearly all of the allegations of the libel, which charged any misconduct

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upon him. The narrative of the facts given by him was substantially as follows :—On November 14, 1846, the libellant came on board the *Zenobia*, then making ready to sail for New York, and applied to respondent for a passage for himself and family. He stated that he was poor and unable to pay full price, and desired to work his passage in part. He said that he was a Dane, and conversed with respondent, who was also a Dane, in the Danish language, and thus interested the sympathies of respondent in his behalf, as a fellow countryman. The respondent was thus persuaded to agree to give him passage at the reduced price of \$300, payable in advance. When, however, the time of payment came, the libellant represented that he had only money enough to pay one-half, and the respondent was then persuaded to accept half the money in cash, and the balance in libellant's note. The libellant thereupon sent on board several cases of merchandise, amongst which was a chest of drawers, as stated in the libel, but respondent had no knowledge of their contents. No bills of lading for this property were given, and the only receipt obtained by libellant was one which he took from the second mate, and was merely for a hat, a compass, and a tea-caddy, which were specially entrusted to the mate. In respect to the time of sailing, the respondent told libellant at the time of his taking passage, that he could not tell when he should sail, but did not expect to sail before the latter part of November, but he recommended libellant to get his family down and on board as soon as possible. The libellant then left to go for his family, but he having been gone a long time, respondent wrote to him, urging him to return without delay, and saying that as near as he knew, the vessel would sail on or about the 28th. The vessel did not actually leave Whampoa till the 27th. The answer also denied having done any thing to delay or thwart the libellant in procuring his property to be passed through the custom-house.

The answer insisted that the claim of the libellant that

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he had \$2,500 in specie in his chest of drawers, showed that the contract of affreightment was procured through false and fraudulent pretences of poverty, and for this reason respondent contended that libellant was entitled to no remedy upon the contract. He also insisted that the contract was a personal one, and not within the jurisdiction of the Court.

The answer of the claimant, David Carnigie, set up substantially the same matters of defence with that of Cronstadt.

The details of the testimony given at the hearing are omitted,—the interest of the case lying in the points of law ruled by the Court.

Abner Benedict, for the libellant.

Francis B. Cutting, for the claimant and respondent.

BETTS, J. The libellant seeks to recover, in this action, for several distinct items of damage connected with a breach of a contract of affreightment, entered into between himself and the master of the *Zenobia*, and which, as he charges, was wilfully violated by the latter. The allegations of damage are, many of them, distinct in their nature, and require to be separately considered.

The libellant shipped on board of the *Zenobia*, then lying at Whampoa, China, for transportation to this port, sundry cases of merchandise. On the arrival of the vessel here, it was found that the articles contained in a trunk belonging to libellant had become injured by being wet. The other cases passed into the custom-house, and by the neglect of the master to make the proper entries upon the ship's manifest, the libellant was greatly delayed in obtaining their delivery to him. The vessel is undoubtedly responsible to the libellant for the safe carriage and delivery of the goods laden by him on board her, and he is entitled to recover damages for a breach of duty in this respect.

As regards the injury to the articles contained in the trunk, the defence is, that the damage was occasioned by the perils

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of the sea. But there being no bill of lading in the case, exempting the vessel from liability for losses arising from perils of the sea, it becomes necessary for the claimants to prove that the injury arose from supernatural causes. In other words, the liability of the ship, as a common carrier, can only be discharged by showing that the loss was incurred from perils embraced within the meaning of the phrase, "the act of God." The cases are very numerous in which the attempt has been made to exempt the common carrier from this strict liability for losses occasioned by casualties not absolutely unavoidable; but the rule is uniform, and is sanctioned by authority too strong to be questioned, that to bring a disaster within the scope of the phrase, "the act of God," for the purpose of relieving the common carrier from responsibility, it is necessary to show that it occurred independent of human action or neglect. It is only a natural and inevitable necessity, and one arising wholly above the control of human agencies, which constitutes the peril or disaster contemplated by that phrase. 2 *Kent*, 597. In the absence of an exemption to be gathered from the contract of affreightment, the carrier cannot excuse a loss, resulting in any degree from the influence of human means, excepting only a loss from the force exerted by a public enemy. Numerous cases upon this subject are collected and discussed in *McArthur v. Sears*, 21 *Wend.* 190. See, also, *The Reeside*, 2 *Sumn.* 571; 1 *Conn.* 487; *Story on Bailm.* §§ 512, 531; *Whitesides v. Russel*, 8 *Serg. & W.* 44. Any act of omission, neglect, or carelessness on the part of the master or crew, contributing to the loss, takes away the protection of the defence here relied upon.

It is in proof, on the part of the libellant, that the trunk was stored in the long-boat, and that such storage was not proper for freight of that description. The vessel must therefore be held responsible for the injury received by the contents of the trunk.

There is also a demand for damages because of the misconduct of the master in the preparation of his manifest, and in thwarting the libellant in his efforts to obtain the delivery of his goods in this port. How far these particulars if proved with all the aggravations charged in the libel, might afford substantive ground of action, I do not now examine or decide. The testimony does not present a case requiring such decision. But the delay of the master in presenting a proper manifest, so that the libellant could pass his property through the custom-house, is a neglect of his duty as master; and damages naturally incident to any failure of duty towards the shipment on the part of the master, fall properly within the responsibility of the vessel. She is bound for the safe carriage and due delivery of the cargo; and acts of misconduct by the master, which are injurious in either respect to the shipper, will subject her to make adequate recompense to the freighter. The liability of the vessel upon this score is, however, limited to damages for the act or neglect of the master in his capacity as such. For any tortious endeavor on his part to prevent the libellant from recovering possession of his goods, she is not responsible; nor would such acts of the master, committed at this port, and in command of the ship, fall within the jurisdiction of the Court, in an action against him personally.

It will be difficult to fix upon a measure of damages in that respect which will meet the particular merits of the case yet rest on principles of general application. The actual damage to the owner of goods may be very great, yet when the damage to a considerable degree is merely consequential, it cannot be charged in its entirety upon the vessel as the immediate and proximate cause of it. If the goods were subject to freight, I should be inclined to regard a loss from the misconduct of the master in withholding their delivery, a proper counter-claim against the freight; but these goods being the personal baggage of libellant and family, and not chargeable

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with freight, I think some compensation awarded by way of demurrage as it were, will be the appropriate mode of satisfaction. The master made oath before the deputy collector to the manifest, on May 8th, the libellant being then here, seeking the delivery of his property; and did not make the proper baggage entry thereon, so that the goods could be obtained by the libellant until June 15th. This act, although importing wilful misconduct on the part of the master, was yet within the scope of his authority, and accordingly the vessel stands chargeable with its consequences. *Abbott on Shipp.* 152, 158. I regard the delay to the owner in obtaining his goods, and his necessary expense in procuring them from the custom-house, as imposing on him a loss or damage amounting to \$2 per day; and without a more satisfactory measure of compensation, I shall adopt that as a reasonable remuneration, and allow him the sum of \$74, because of the wrongful non-delivery of his property pursuant to the shipping contract.

The libellant charges that a chest of drawers which was shipped by him amongst the cases of merchandise above referred to, contained the sum of twenty-five hundred dollars in specie, and that this money was missing from the chest when delivered to him in this port. There is no evidence, however, to support either of these averments; and the claimant proves, by the testimony of one of the mates of the vessel, that the libellant himself had access to the chest of drawers while it was yet on board the vessel; that he took a bundle from the furniture previous to its being landed, and that no complaint was then made by him of the loss of any money. He establishes no right to recovery on this part of his claim.

The libel avers that the libellant contracted with the master of the Zenobia to convey him and his family from Whampoa to this port; that he paid the master of the bark in advance \$150, being one half of the passage money, and that the vessel sailed without him, previous to the time appointed

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and without his knowledge. I think the libellant has established this charge, and is entitled to recover against the bark his damages for this breach of contract by the master, to transport him and his family as passengers. This contract was one which it was competent for the master to make in the employment of the ship, and became binding on the vessel. *Abbott on Shipp.* 160; 3 *Kent*, 162. The vessel is liable on this contract for the \$150 paid the master in advance in China, upon the grounds stated in the former decision of the Court in this cause, in July last.¹

The libellant came down from his residence at Hong Kong to Whampoa, in season to embark on the Zenobia on November 28th, which was her appointed day of sailing, but found she had already left. His expenses incurred in coming down to Whampoa are stated at \$60, and his further expenses incurred through his detention at Whampoa, at \$64, besides \$16 paid in going to Canton to confer with the agents of the bark respecting her departure. There is no ground upon which the libellant can claim to recover the cost of his passage from Hong Kong to Whampoa, as he must necessarily have made that voyage, whether he came home in the Zenobia or the Rainbow. But the vessel is chargeable with the expenses of the libellant incurred in waiting at Whampoa, after the Zenobia had left, for the sailing of a vessel in which he might take passage to the United States. The evidence shows that \$64 is a moderate allowance for those expenses, and that sum should accordingly be allowed.

It is not necessary to discuss the question of the liability of the vessel or master to the libellant for the disbursements said to have been made at Canton in a premium for the loan alleged in the libel to have been paid, or for the new supply of clothing for himself and family there purchased. No proof

* Reported *ante*, 48.

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is given that the libellant made any such disbursements, and the Court cannot presume them from any supposed necessity, arising from the circumstances of the case.

I consider the bark equitably liable because of the violation of the contract to transport the libellant and his family to this port, in damages equal to the cost of his passage to this country in the Rainbow, upon the general grounds upon which I have already placed his right to recover back the advance passage-money. That disbursement is fairly chargeable upon the ship as a portion of the damages recoverable by libellant for the breach of the passage contract. The sum of \$400 paid by him is proved to be below the usual and customary rate of charge for such passages, and that sum he is entitled to recover.

A reference must necessarily be had to a commissioner, to ascertain the amount of injury to the clothes contained in the trunk, by wetting, unless the parties can agree to the amount of such damage.

It is proper to remark, in respect to the deposition of Captain Cronstadt, the respondent, which was offered in the cause, that even if it were legally admissible, it would not in my estimation, displace the other evidence in the cause, nor vindicate his conduct. But he stands a party to the suit, being prosecuted *in personam*, and subject to a decree against himself for all the liabilities of the vessel in this behalf; and the case of *Bridges v. Armour*, (5 *How.* 91,) seems to settle the point that he is an incompetent witness in the cause.

The decree will accordingly be for the libellant, as above, and for full costs of suit.

THE COLUMBUS.

Where goods were damaged during transportation on board ship, and were received by consignees upon an understanding that the depreciation was to be made good to them, and they were sold by auction by the consignees, but with the assent of the master,—*Held*, that for the purpose of making adjustment of the amount due from the vessel for the injury, the sum realized at the sale should be regarded as the value of the goods in their damaged state.

THIS was a libel *in rem* by Gustavus Loenig and Charles Schneider against the bark Columbus, to recover damages for injuries received by goods shipped on board the bark to the libellants, as consignees.

The facts of the case are stated in the report of the proceedings had upon exceptions heretofore taken to a commissioner's report, (*ante*, 37.) After the decision disallowing those exceptions, an order was entered in July, 1847, referring the cause back to the commissioner to reëxamine and state the account between the parties. He reported a balance due to the libellants of \$267.51.

The cause again came up upon exceptions to this further report of the commissioner.

There was an exception upon the ground that the commissioner's estimate of the original value of the corks, which were the subject of the action, at their port of shipment, was higher than was supported by the evidence; and this exception was sustained by the Court, the valuation adopted by the commissioner being reduced from \$696.08 to \$677.87.

There was another exception taken on behalf of the claimants, upon the ground that the commissioner had improperly received evidence of the sum realized by the sale of the damaged corks at auction, as fixing their value in their damaged condition. It is to the question raised by this exception that the opinion of the Court principally relates.

The Columbus.

E. C. Benedict, for the libellants.*Francis B. Cutting*, for the claimants.

BETTS, J. The quantity of corks, for the injury to which the libellants seek to recover in this action, is differently stated by the libellants and by their witnesses. By the account of sales and estimate of damage rendered to the claimants by the libellants, June 23, 1846, they charge for 192 bags, containing 50 gross in each bag, valued at $7\frac{1}{4}$ cents per gross, which gives the product \$696. But the auctioneer's account of sales, returns only 187 bags sold, which, on a like computation, would amount to \$677.87. The variation is of no great moment, yet the owner is entitled to every legal allowance. Taking the latter sum as the proved original value of the goods, and rectifying the computation of the commissioner accordingly, the balance reported due to the libellants should be \$249.38, instead of \$267.51.

The libellants clearly proved by the testimony of their carman and clerks, that the corks were in a damaged condition when landed here; and the fair purport of all the testimony before the Court and commissioner may well be taken to be, that the libellants never accepted the corks as their property, except upon the understood condition that the damage should be made good to them. It appears that an arbitration was at first agreed upon between the libellants and the master to ascertain the injury or depreciation, but the master being advised that by so adjusting the matter, he might be embarrassed in his remedy abroad, he declined to do so, and the libellants then gave him notice that they should send the goods to auction. On the first hearing, I thought the proofs not very distinct that the captain assented to the auction sale; but a review of the evidence then taken, in connection with the proofs since put in before the commissioner, satisfies me that the sale was fully approved by him. He did more than merely acquiesce in it. He sent men from his vessel to put

up the corks, and arrange them for an advantageous sale in that manner.

The exception by the claimants rests upon the positions that the consignees, after receiving the goods, had no rightful authority to send them to auction at the risk of the vessel; and second, that at any rate they could not sell them, sound and unsound together, as a means to ascertain their value. And it is contended, that it was at least their duty to select the sound and retain them at the invoice value, and to allow the damaged ones only to be sold at auction. The latter branch of the argument was sufficiently adverted to in the opinion pronounced upon the original hearing, and the views of the Court upon that point will not be again stated.

It does not appear to me that the case comes up in a manner which requires an opinion upon the general question, whether the owner or consignee of goods accepted from a carrier in a damaged condition, may, of his own authority, make auction sale of them, and charge the carrier with the difference between their sound value and the prices obtained for them at public sale. The libellants did not undertake to act upon their own authority, but a sale at auction was proposed by them to the master, as a means of determining what damage or deterioration the goods had sustained, and the sale made was made with the sanction and acquiescence of the master. To all reasonable intents, this method of fixing the amount of injury or loss is just as obligatory on him and the vessel, as a submission to arbitration, or an adjustment by mutual agreement between the parties. It does not appear that any witness, knowing the condition of the goods, considered the sale-prices at all below their marketable value. The sale at auction, under such circumstances, was properly admissible as evidence of the value of the goods when landed; and fortified as it is by the estimate and judgment of witnesses, it becomes a reasonably satisfactory measure of the loss sustained. In my opinion, therefore, the commis-

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sioner properly received proof of the auction sale as evidence to determine the measure of damages, and I also think that, independent of that particular, the weight of evidence is that the corks were not worth more than the amount reported by the commissioner.

The exceptions are disallowed without costs, and a decree is to be entered for the libellants for \$249.38, with interest at six per cent. from June 11, 1846, the time of filing the libel herein, together with the costs to be taxed.

THE RHODE ISLAND.

The legality or propriety of an order of reference cannot be impeached upon exception to the report.

The general rule of damages applicable to collisions which are not wilful is, that the owner of the injured vessel is to receive a remuneration which will place him in the situation in which he would have been but for the collision.

The owner of a vessel, showing himself entitled to damages for collision, is entitled to compensation for the loss of the use of his vessel during the time consumed in making repairs.

In the absence of direct evidence of the amount of this item of loss, interest upon the value of the vessel for the time occupied in making repairs may be awarded as a fair compensation in this respect.

THIS was a libel *in rem* by the Naugatuck Transportation Company, a corporation created under the laws of Connecticut, and owners of the steam propeller Naugatuck, against the steamboat Rhode Island, to recover damages for a collision between the Naugatuck and the Rhode Island.

The cause was before the Court on the merits of the action in July, 1847, and the proceedings then had are reported, *Olcott*, 505, where the facts of the case are fully stated. The Court then adjudged in favor of the libellants upon their claim, and ordered it to be referred to a commissioner to as-

certain and report the damages sustained by them, including the loss of the time of their propeller while necessarily delayed in receiving repairs.

The cause again came before the Court upon exceptions to the commissioner's report. The nature of the objections urged appear in the opinion.

Francis B. Cutting and *E. H. Owen*, for the libellants.

A. Hamilton and *W. Q. Morton*, for the claimants.

BETTS, J. This case comes before the Court on exceptions taken by both parties to the report of the commissioner.

Many of the objections relate to particular items of allowance or disallowance, which I do not propose to discuss minutely. I shall limit myself to adverting to the general principle to be applied on these points.

The main subject of controversy relates to the estimate of the sum chargeable for the loss of the time of the injured vessel while necessarily delayed in receiving repairs.

The order of reference embraced a direction to ascertain and report that item of injury, and no application was made on the part of the claimants to rescind or modify the order in that respect; it therefore went before the commissioner as a rule obligatory upon him, and now so far concludes the claimants that they cannot, on exception to the report, impeach the legality or propriety of the order. The subject was not debated on the original hearing; and whether this direction was inserted unadvisedly or deliberately by the Court, cannot now be ascertained, nor is it properly open for inquiry.¹

Had the point been raised, the Court would have been called upon to declare definitely whether it sanctioned an allowance to the owners of a vessel injured by collision, for the loss of her services during the period she is necessarily

¹ Compare *The Columbus*, ante, 37.

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detained to receive repairs, and to fix the rule by which that loss was to be valued.

The general principle applicable where the collision is not wilful is, that the owner of the injured vessel is to be recompensed to the amount of his actual loss; that is, he shall receive a remuneration which places him in the situation he would have been but for the collision. *Abbott on Shipp.* 307; 2 *W. R.* 279; *Story on Bailm.* § 608. Although there may be difficulty in defining precisely the particulars composing such actual loss, it clearly includes more than the mere damage to the vessel herself. Every necessary incident directly connected with such damage, becomes also part of the actual loss. The reimbursement of the owner's charges for removing passengers or cargo from the vessel injured, and transporting them to the place of their destination; for salvage services generally, or for any destruction or deterioration of cargo chargeable upon the carrier; and for reloading the cargo for the purpose of being saved or forwarded, would all come within the rule of indemnity and compensation to the injured vessel. *The Narragansett*, *MSS.* 1846.¹ Then, again, as to the measure of the direct injury, the party demanding damages may ascertain them by the judgment and valuation of witnesses, and recover on such valuation without waiting to repair, or attempting to repair his vessel; or he may await the completion of proper repairs, and then claim the expenditures reasonably laid out in her reparation. The latter is the course taken in this case.

To these rules neither party raises any specific objection. The point of controversy is, whether the owner is also entitled to a recompense for being deprived of the use of his vessel for the time she is necessarily detained in receiving repairs. The commissioner reports an allowance on this head of \$20 per

¹ Since reported, *Olcott*, 388.

day, for a period of forty-two days, that is, \$840. The libellants insist that they are entitled to \$30 per day for sixty days, amounting to \$1,800; and the claimants contend that the allowance should not exceed the wages of the officers and crew for the time, actually paid. According to the evidence this would amount to \$8 per day for thirty days, or \$240 in the aggregate, independent of the claim of compensation to the master for his employment, continued after the discharge of the crew, and until the repairs of the boat were completed.

The commissioner was bound, under the order, to inquire into the amount of the loss from demurrage of the vessel whilst undergoing repairs. As already intimated, the claimants cannot, by exception to his report, attack the justness or propriety of the order of reference itself.

The question, what is the rule of damages in such case, and whether an estimate of *probable profits* lost, is a rightful method of determining the amount of such demurrage, is, however, still open, so far as the former adjudication of the Court in the cause is concerned.

The case of *Sidney v. Condry*, (1 *How.* 28,) gives the law to this Court on that subject. The U. S. Supreme Court there say that the rule of demurrage in collision cases is the same as in cases of insurance, and that a party cannot recover for the loss of *probable profits*. The rule was discussed fully and laid down with clearness in the Supreme Court of this State, to the same effect. *Blanchard v. Ely*, 21 *Wend.* 349. The order in this case conformed to the usage of the English Admiralty, (*The Gazelle*, 2 *W. Rob.* 279,) and under it, according to the doctrine declared by the United States Supreme Court, the libellants are restricted to demands which would be allowed for demurrage against underwriters. It is true that Dr. Lushington denies that the common-law doctrine in respect to insurance applies to collision cases which are cases of *tort*. 2 *W. Rob.* 283. But in an earlier case, the United States Supreme Court decided that demur-

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rage (that is, the rate of compensation in actions *ex contractu*) might be adopted as a measure of compensation in cases *ex delicto*. The *Apollo*, 9 *Wheat.* 362. It is an allowance or compensation for the detention of the vessel. 9 *Wheat.* 373. At common law, the allowance is not always governed by the demurrage stipulated by the parties; regard may be had also to the expense and loss incurred by the owner, and the jury must settle the amount. *Abbott on Shipp.* 383; *Morrison v. Bell*, 2 *Campb.* 616.

The Supreme Court declare, with marked emphasis, that an allowance by way of demurrage is the true measure of damages in all cases of mere detention; for that allowance has relation to the ship's expenses, wear and tear, and common employment. The *Apollo*, 9 *Wheat.* 378. Forty dollars per day was allowed in that case for the detention of the vessel, on the judgment of witnesses as to what would be a reasonable compensation for being kept out of employment.

Dr. Lushington makes up the compensation for demurrage by deducting from the gross freight so much as would, in ordinary cases, be disbursed in the earning of freight. The *Gazelle*, 2 *W. Rob.* 284.

There does not appear to be any charge presented in this case for actual loss of freight. The damages are claimed upon the footing of the assumed earnings or profits which the vessel might realize during the period of her detention. This ground is declared inadmissible by both cases in the Supreme Court. The *Apollo*, 9 *Wheat.* 378; *Smith v. Condry*, 1 *How.* 35.

As it is fitting in Admiralty courts that some rule of general application should be observed in awarding discretionary damages, I am induced to think, in the absence of direct evidence of loss, that the value of the vessel should be regarded, and that a reasonable percentage upon that value may be properly taken as a fair measure of loss.

The maintenance and wages of the crew being provided

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for, and no wear or tear that is appreciable being shown, it seems to me that the positive damage sustained by the party consists in being kept out of the use of his capital, the value of the vessel, during her repairs; and a proper percentage on that capital would afford an admissible mode of compensation. In this case I adopt six per cent., the usual rate of interest awarded by this Court, and the legal rate in Connecticut, where the vessel is owned, as a reasonable allowance in that respect. On a review of the evidence, I am satisfied with the conclusion adopted by the commissioner, that forty-two days was a reasonable time to allow for making the repairs. The actual time occupied cannot be shown very satisfactorily, as much other work was mixed with them, and the boat was wholly overhauled, and put in a condition for her next season's service, leading to a large amount of outlay of time, labor, and materials not necessary to the reparation of this particular injury. But the exception to the report on this head must prevail, and the report be set aside, because of the measure of damages adopted by the commissioner, the amount of the supposed earnings of the vessel for the period of her detention not being a legal criterion by which to determine the damages occasioned by the detention. The testimony does not enable me to fix the sum, according to the principles now declared, as the expense of the maintenance of the master and crew are not proved, nor the value of the boat.

The case must accordingly go back to the commissioner to ascertain and report those particulars upon the principles indicated.

Injuries from torts must be compensated, in almost all instances, more or less with a view to facts peculiar to each particular case. In adopting, in this instance, interest or a percentage on the value of the boat for the time she was kept out of the libellant's use by means of the collision, I do not assume to lay that down as a particular always to be admit-

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ted in determining the damages occasioned by a wrongful collision. I regard it, in the present instance, as a reasonable mode of compensating the party for what is a positive loss to him, and as one which avoids the vague and objectionable valuation of the probable earnings of the boat, had she not been so prevented following her usual employment.¹ Merely

¹ The case was appealed to the Circuit Court, and the propriety of the measure of damages thus laid down was the chief question discussed. The decree below was affirmed, the following reasons being given :—

NELSON, J., after stating the facts. I do not understand this direction given by the District Court, in respect to the rule of damages, as intended to be laid down as a general rule to govern cases of this kind, but as an approximation to an indemnity, in this particular case, and under its peculiar circumstances. It was an allowance for a supposed or apparent loss, incident to the damage done by the collision, for which no settled rule could be found, and in respect to which, opinions, whether any thing should be allowed or not, and if any thing, by what rule the allowance should be determined, are conflicting and unsettled. The difficulty is intrinsic, arising out of the nature and description of the loss, as the precise amount, or even a reasonable approximation to it, cannot be ascertained by the application of any known or fixed rule. On this ground, the application was denied altogether, in an analogous case, in the Supreme Court of New York. *Blanchard v. Ely*, 21 *Wend.* 342. That some loss enters into the general damage to the vessel, on account of the time necessarily consumed in making the repairs, is obvious enough, and results directly from the injury; but the difficulty lies in finding any rule by which to ascertain the amount with the certainty required by law; that is contingent and speculative and depends upon the profits of the business in which the vessel is engaged. If the owners had hired another vessel of the kind to supply the place of the disabled one while she was undergoing repairs, for a reasonable compensation, there might have been something tangible,—the amount actually paid for the purpose of continuing the business. I do not say this would be free from difficulty, or that it could be brought within any fixed rule of law,—all I mean to say is, that there would be less embarrassment in the allowance than in the case before us, where the party did not see fit to assume the risk and responsibility of a substitute. The character and profits of the business are grounds, doubtless, upon which to determine whether it would be expedient for him to go to the expense and trouble of procuring another vessel,—a risk, perhaps, which he

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to repay the libellants the money expended by them in repairing their vessel, would most palpably fall short of a *restitutio in integrum*, which is the right of an injured party against a wrong done.

I think, also, the employment of the master as a superintendant of the boat and her repairs, was, under the circumstances, proper, and that the libellants are entitled to reimbursement for the sum paid him per day for forty-two days.

A careful consideration of the testimony satisfies me that the commissioner, in all other particulars, had arrived at substantially correct conclusions, and I shall not disturb his finding, except as above stated. In many particulars of valuation reported by the commissioner, there is room for diversity of opinion; yet any corrections I might attempt to make upon my appreciation of the evidence set forth on paper, would stand equally liable to be varied in the courts of appeal. The usage in the Admiralty courts—and the same principle, in substance, prevails in equity—is to adopt the decision of facts made by the tribunal which had the witnesses and parties on hearing face to face before it, unless some error or mistake is

had a right to assume,—and as the expense of it was occasioned by the collision, there would seem to be some propriety in the allowance as an item of damages. But these considerations do not enter into the case, when no substitute has been procured. How far the Court would feel itself justified in the allowance where a vessel has been actually employed, is a question I do not intend to determine. As before said, there are difficulties attending it which should lead to caution and hesitation in the adoption of that sum as the measure of compensation. It might involve the question, whether it was practicable to procure another vessel; for if it was not, after a fair endeavor, the allowance would seem to be as reasonable as if one had been in fact obtained. Upon the whole, I am inclined not to interfere with the allowance as made, not because I think it founded upon any fixed or established principle, but because it is just enough in itself, and I have not been able to find any principle that would justify the adoption of a higher measure of damages in the given case.

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plainly manifest.' The *Apollo*, 9 *Wheat*. 378. I find none in this case, and on a careful review of the proofs and comparison of them with the report, by aid of the acute and critical argument of the counsel on both sides, I am convinced that the decision of the commissioner is substantially correct on the facts, and ought not to be disturbed.

The exceptions on both sides are accordingly overruled, except as above allowed, and without costs to either party.

Order accordingly.

THE GOVERNOR.

Where two vessels are running in the same direction, the one astern of the other, there rests upon the rear vessel an obligation to exercise precaution against collision, which is not chargeable to the same extent upon the other.

A vessel of superior speed, running in the same direction with a slower one, has a right to pass her if she can do so with safety to both; but the burden of proof is upon her, in case of collision, to show the prudence of her own conduct, and also to prove negligence or misconduct on the part of her rival.

A vessel in advance is not bound to give way, or to give facilities to enable a vessel in her rear to pass her, though she is bound to refrain from any manoeuvres calculated to embarrass the latter in an attempt to pass.

In collision cases, the Court will attach a greater weight to the testimony of witnesses to facts which occurred within their own knowledge, on board their own vessel, than to any opinions or judgments formed by those upon one vessel respecting the management of the other.

THIS was a libel *in rem* by John Van Pelt, owner of the steamboat Worcester, against the steamboat Governor, to recover damages for a collision.

The collision complained of occurred under the following circumstances: The steamboats Worcester and Governor were passenger vessels, which sailed tri-weekly from New York, on the same day and at the same hours. They left

* 1 See, also, *Holmes v. Dodge*, *ante*, 60.

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New York on the afternoon of March 2, 1847, about simultaneously, bound on the same course up the Sound for Boston. The Worcester belonged to the Norwich line of steamboats, the Governor to the Stonington line. As they passed through the East River and through Hell Gate, the Worcester was somewhat ahead, the Governor being most of the time in her wake, and occasionally lapped upon one quarter. The Governor was slightly the superior in speed, and was seeking, from time to time, between New York and Sands' Point, to avail herself of a favorable opportunity to pass her rival. The boats ran in company in this manner, from one to two lengths apart, until, when they reached the Steppingstones, three or four miles from Sands' Point, the Governor took a course parallel with that of the Worcester, and continued a length or two distant from her, each boat steering for Sands' Point buoy, and in such manner as to give it in passing the usual safe berth. They came in collision at that place—the larboard bow of the Governor striking the starboard quarter of the Worcester, near the gangway and just aft the boiler, and causing some little damage, the expense of repairing which amounted to \$53.

The cause now came before the Court upon the pleadings and proofs. There was some conflict of testimony upon the question which of the boats was responsible for the collision. Several witnesses, who were on board the Governor at the time, testified that that boat held her course steadily, edging as close to the shore as could be done with safety, and in such manner that she brought the buoy at Sands' Point against her starboard guards and under them; and that the Worcester, as it appeared to the witnesses, deviated from her true course, bearing towards the Governor, until, when within a quarter of a mile from the buoy, she sheered directly across the bows of the latter boat, thus causing the collision. The two pilots on board the Worcester, on the contrary, both swore that that boat was running by the compass N. E. $\frac{1}{4}$ E.,

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from the time of passing the Stepping-Stones up to the moment of collision; that she was not sheered from that course towards the Governor; that the course of the Worcester was the course usually taken by steamboats on the Sound to pass Sands' Point, being calculated to secure a safe berth from the buoy; and that the usage of navigation was to run near Sands' Point in going into the Sound. In these general statements as to the course of navigation, all of the witnesses on both sides, who were acquainted with the subject, concurred.

Luther R. Marsh, for libellants.

John Sherwood and *S. Sherwood*, for respondents.

BETTS, J. If the Worcester and the Governor had been running in opposite directions, the collision might, probably, have been deemed to be so far the result of mere casualty and misadventure as to leave each vessel to bear for herself the consequences of the accident falling upon her.¹ But the fact that they were running in the same direction, the one astern of the other, imposed upon the rear boat an obligation to precaution and care which is not chargeable to the same extent upon the other. In the light of this principle, the circumstances of the present case manifestly cast the burden of proof upon the Governor. She was astern, and was seeking to run past the Worcester. She had a right to the advantage of her superior speed, and under such circumstances it would have been tortious and blameable conduct on the part of the Worcester designedly to intercept the Governor, to crowd her off, or to baffle her in that effort.² But it devolves upon the

¹ See *The Moxey*, *ante*, 73, where the authorities upon this point are mentioned.

² Compare the case of *The Rhode Island*, *Olcott*, 505, where the relative rights and duties of two steamboats, bound in the same direction, the one in advance of the other, are discussed.

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Governor to show the prudence of her own conduct, as well as to prove negligence or misconduct on the part of the Worcester. It was not the duty of the latter boat to veer from her course so as to open a passage for the Governor, or to lend her any facility in aid of her purpose to pass. We may censure any rigid adherence to strict right by which one competing boat interposes embarrassments in the way of her competitor, and may regret the want of a magnanimous and liberal course of conduct which might relieve a vessel of superior-speed and endeavoring to get ahead, from delay or difficulty in accomplishing that object. But the Court is only empowered to adjudicate the legal rights of the one and the responsibility of the other.

It was therefore clearly the duty of the Governor to select a place for passing the Worcester, and a mode of effecting it, which would not expose the latter to injury. The rear boat, in such case, must stop her way, or back off and await the opening of a sufficient passage, if the leading boat is so placed that safe room is not left to pass without coming within a hazardous proximity to her. The general law of navigation secures to vessels under way the track they are rightfully pursuing, and makes it cause of damage for others to molest or crowd upon them in it. *Jacob. Sea L.* 338. This subject is often regulated by municipal laws in respect to vessels within the jurisdiction of the particular government; and if such laws are not of positive obligation in maritime courts, they are frequently adopted as rules of decision in respect to collisions on the waters of the State, or by vessels owned within it.¹ The defence has accordingly been placed upon the

¹ A statute of the State of New York prescribes that "Whenever any steamboat shall be going in the same direction with another steamboat ahead of it, it shall not be lawful to navigate the first mentioned boat so as to approach or pass the other boat so being ahead, within the distance of twenty yards; and it shall not be lawful so to navigate the steamboat so being ahead,

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ground that the Governor was on a course which afforded ample room for both boats to pass the buoy and Sands' Point without interfering, and that the Worcester, by design or through carelessness, veered from her proper track, and bore across that of the Governor. This fact is the turning point in the case, and vital to the defence.

Several witnesses, who were on board the Governor at the time of the collision, give their opinion in decided terms that such was the fact. The master of the Governor, her pilot, and several passengers on board, concur in stating that the Worcester suddenly bore off her course to the starboard, when the Governor was a quarter of a mile in her rear, and that she crowded in upon Sands' Point so much that the Governor, if she continued moving, must either strike her or go upon the rock.

It appears to me this evidence fails to establish a justification of her conduct, for two reasons:—

First.—It is not shown that the engine of the Governor was stopped, or slowed, as soon as there appeared to be danger that the two boats might come together, nor that the full means in her power were employed in due season to avoid coming upon the Worcester; for the master of the Governor, in his testimony, admits he could have avoided striking the Worcester, if, at the time when he first noticed that she was altering her course, he had supposed that she would crowd in so closely upon his track.

Second.—The evidence charging the fault upon the Worcester is essentially matter of opinion, and not statements of facts. The witnesses say that the Worcester appeared to them to bear down upon and to cross the Governor's line of approach. These witnesses were upon the Governor, and

as unnecessarily to bring it within twenty yards of the steamboat following it." 1 Rev. Stat. 682, § 7. Penalty, \$250. *Ib.* 683, § 8.

their judgment as to the direction of the other vessel was guided by nothing more than the apparent approximation of the two, and the impression that the converging was caused by a wrong movement of the Worcester. Their position was most unfavorable to an exact and accurate judgment on that point. No range was taken to any fixed object, nor was the course or bearing of either boat observed by the compass. They were themselves advancing with great speed, and were looking at an object several hundred yards distant, moving from them with velocity. Very slight reliance can be placed in the opinions of witnesses so circumstanced, as to the actual bearing and course the Worcester was pursuing at the time. These impressions and opinions of the witnesses must be weighed as part of the evidence in the case, particularly so far as they may avail in corroboration of facts proved, or to countervail testimony of like character from the other party; but alone they would scarcely justify a judgment in conformity to them. They are, however, met by the testimony of the two pilots on board the Worcester, both of whom deny that there was any deviation or alteration in her course, such as was stated to have taken place by the witnesses on the Governor, and who say that her course was the one usually taken by steamboats on the Sound in passing the Point.

In collision cases, the Court always discriminates carefully between the testimony of witnesses to facts which they assert to have occurred upon their own vessel and within their own knowledge, and the opinions and beliefs expressed by them in respect to what occurred upon the adverse vessel. Where the witnesses are credible, their direct testimony to what was done or omitted by themselves or by others under their immediate and direct observation, is far more satisfactory and decisive than any opinions or inferences formed in respect to matters lying without their positive knowledge, especially where those matters relate to the management of another vessel. However intelligent and upright the witnesses may be,

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there must always be great difficulty in judging accurately in respect to the manner in which a distant vessel is navigated ; and the natural difficulties in the way of forming a sound judgment in respect to the management of such vessel are greatly enhanced in the case of collision, by the excitements of the occasion, and by the many circumstances which go to give a bias or prejudice to the mind. Thus it is observed that persons on board each vessel almost invariably attribute the collision and fault of the occurrence to the opposite one. The testimony of witnesses to their knowledge of what occurred upon their own ship accordingly justly outweighs that of superior numbers, who speak only from a judgment or opinion, formed from distant observation.¹

In this view of the case, I regard it as proved, by a preponderance of testimony, that the Worcester held her regular and proper course without deviation. That course, having an inclination towards the buoy, brought her nearer to it, and with greater rapidity than was anticipated or supposed by those on board the Governor. The latter boat was accordingly kept on a line of direction as if under the persuasion that the Worcester must continue at about the same distance from the buoy in running out her course as she was from the Governor. The master of the Governor, however, was evidently aware that the boats were approximating each other, and enough was brought to his notice to have put him upon his guard and to call for the exercise of great caution. He says that he could have avoided the Worcester when he first saw her alter her course near the place of collision, but he had no idea that she would "jam in so close." As soon as he became aware of it, he shut off steam and stopped his boat. It was then too late, however, as the boats were already

¹ See, also, remarks of the Court upon this subject, in *The Steamboat Naraganset*, *Olcott*, 246 ; *The Sloop Argus*, *Ib.* 304 ; *The Rhode Island*, *Ib.* 505.

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almost in the act of striking. Upon these facts, the Governor is chargeable with blame, and must be liable for the consequences.

The damages were fortunately very slight. The bill of repairs presented, the payment of which only is claimed, amounted to no more than \$53. The payment of that sum would have avoided this controversy; and, as the Worcester demanded no more than her actual disbursements, to which she was clearly entitled, the claimant must be charged with the costs arising from the contestation of that claim.

Decree for the libellant for \$53, with interest at six per cent. from March 10, 1847, together with costs to be taxed.

MANCHESTER v. MILNE.

A deed of assignment executed in another State, and attested by two subscribing witnesses, was offered in evidence, accompanied by proof of the signatures of one of the witnesses, and of both the assignors.

Held,—1. That the witnesses were presumed to reside at the place of execution and to be without the jurisdiction of the Court.

2. That the proof of the assignors' signatures was admissible as secondary evidence of the execution.

A variance between the amount of a cargo of coal as stated in the bill of lading, and the amount of such cargo as ascertained on delivery at the port of consignment, may be explained by showing that the mode of ascertaining the quantity is such that similar variations are necessarily of frequent occurrence.¹

THIS was a libel *in personam*, by Cyrus B. Manchester against George Milne, to recover for freight and primage on a cargo of coal, shipped from Liverpool to New York, on board the ship American.

On the hearing, the libellant proved the shipment of the

¹ Compare *Manning v. Hoover*, decided in February, 1848, and reported *post* in its order of date.

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coal, September 30, 1846, at which time the vessel was owned by the Messrs. Arnold. He put in evidence the bill of lading, which was for 200 tons of Orrell coal, at the rate of six shillings sterling per ton freight, and five per cent. primage.

To show his right to maintain the action, he also put in evidence an assignment of the vessel and her freight, made November 21, 1846, by the then owners of the ship, to the libellant. The assignment was under seal, and executed in Providence, R. I., having been also acknowledged and there recorded. It was attested by two subscribing witnesses. The libellant proved the signature of one of these witnesses, and that such witness resided in Providence, and also proved the signatures of the assignors; but the residence of the other subscribing witness was not shown, nor his absence accounted for.

The respondent objected that the proof of the execution of the assignment was insufficient, the absent witness not being shown to be dead, or to be out of the jurisdiction of the Court. The libellant contended that the acknowledgment of the instrument in the place where it was executed, being by the local law competent proof of its due execution, was also sufficient evidence here. The Court ruled this point against him, but decided that the proof given established the due execution of the instrument, and that the libellant was entitled upon it to maintain the action.

The respondent then gave evidence in defence, tending to show that the vessel made short delivery of the cargo; that out of the two hundred tons mentioned in the bill of lading, less than one hundred and eighty-five were delivered at the port of consignment. The character of the evidence on both sides, in relation to this point, appears from the opinion.

BETTS, J. Where an instrument under seal, attested by a subscribing witness, is to be proved, and the production of the witness himself is excused, the technical rule of evidence

requires proof of his signature, even though the execution by the principal party be proved by his most solemn admission out of Court. 1 *Greenl. Ev.* § 569 ; 1 *Phill. Ev.* 473. This rule is arbitrary and formal, as it dispenses with direct proof of the identity of the principal party, the essential particular in the question whether the deed is actually his, and admits proof of the handwriting of an absent subscribing witness to the deed to establish that fact ; and countenances the further implication that the witness was present and saw the signature, the sealing, and delivery of the deed which he attested.

Where none of the subscribing witnesses to an instrument are capable of being examined, it is only necessary to prove the handwriting of one of them. 1 *Greenl. Ev.* § 575 ; 1 *Phill. Ev.* 473. Where a deed, executed in a foreign State, is offered in evidence, it is to be presumed that the attesting witnesses resided at the place of execution, and secondary proof is admissible. 3 *Phill. Ev. Cow. & H.* 1297. Proof of the handwriting of the assignor is at least equivalent, in the identification of the assignor or grantor, to the secondary evidence of the handwriting of a subscribing witness, if it be not competent as primary and direct. The objection to the admissibility of the assignment, upon the proof given, was therefore correctly overruled.

The contest upon the merits of the case relates to the question whether there was a short delivery of cargo. The proof of the quantity delivered is not very precise or satisfactory. The estimate of the quantity was arrived at by weighing five separate tubs of the coal, and ascertaining the average weight per tub, and the number of tubs which make up by measure a chaldron, and thus from a computation of chaldrons determining the quantity of coal delivered. This method of ascertaining quantities of Liverpool coal is proved to be the established usage of the trade in this port. That species of coal is purchased and shipped abroad by weight, and is un-

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laden and sold in this market by the chaldron. There is also clear evidence to show that the computed weight so ascertained is almost invariably short of that stated in the invoices and bills of lading. This variance being so common, is no doubt provided for in the original purchases; but as a means of determining with certainty whether the weight shipped holds out on delivery, this method of measurement cannot be made the basis of any positive or sure determination. It affords an approximation which ordinarily will be found, it would seem, on the proofs, to come within two or three per cent. of uniformity. The state of the weather, whether dry or wet, when the coal is weighed and laden on board, and the quality of the coal, whether coarse or fine, are particulars essentially varying the result, when the cargo comes to be unladen by measure, often reducing the invoice weight from four to nine per cent.

In the present case, the difference was nearly eight per cent. There is evidence that a small quantity was used by the ship during the voyage, but this was done with the knowledge and assent of the agent of the respondent, and was but to a very inconsiderable amount, by no means sufficient to account for the disparity between the bill of lading and the weighmaster's return here. I think the evidence in respect to the waste is not sufficient to subject the vessel to any charge or responsibility for such use; and I am further of opinion that the decided weight of evidence, direct and presumptive, is, that the delivery made acquitted the ship of her liability under the bill of lading.

The decree must accordingly be in favor of the libellant, it being referred to a commissioner to compute the amount of freight due.

The Flash.

THE FLASH.

The master of a vessel having contracted for the transportation of a cargo, the performance of the contract was interrupted while the lading of the cargo on board was going on, by the death of the master, and by the freezing up of the vessel. The owner repudiated the contract, and refused either to take on board the residue of the cargo or to deliver up that already laden.

Held,—1. That the contract was binding upon the vessel and owner.

2. That the owner was, under the circumstances, entitled to indulgence for a reasonable time, both to procure a new master and to await the relief of his vessel.

3. That upon the owner's refusal to be bound by the contract, the libellant was entitled to proceed against the vessel for his damages.

4. That the libellant could recover damages for the value of the brick laden on board and withheld ;—for the cost of transporting the residue from his store-house to the dock ;—for any injuries received by them while they lay there awaiting the owner's acceptance ;—and for the difference in his disfavor, if any, between the contract price of transportation and his actual expenses incurred in obtaining another mode of conveyance.

5. That the libellant could not recover against the vessel for injuries received by the property after notice of the owner's refusal to complete the contract, but that the vessel was chargeable with the cost of transporting the portion of cargo left behind, to its place of destination.

THIS was a libel *in rem*, by William Churchill, against the schooner Flash, to recover damages for the non-fulfilment of a contract of affreightment.

The cause was before the Court in December, 1847, upon demurrer, and the proceedings thereupon are reported *ante*, 67, where the substance of the libel is stated. It alleged that the master of the Flash, which was a New York vessel, contracted with the libellant, at New York, to carry a cargo of bricks in the schooner, from New York to Brooklyn ; that the master took a portion of the cargo on board, but afterwards refused either to deliver up that portion or to take on the residue. The cause now came up for hearing upon the pleadings and proofs. The facts relied upon as a defence appear in the opinion.

William Jay Haskett, for libellant.

J. M. Cooper, for claimant, contended that the contract set up by libellant was one only binding upon the master personally, but not upon the owner, and, therefore, did not bind the vessel; (*The David*, 1 *Rob.* 301; *Abbott on Shipp.* 161;) and that no breach of contract had been shown, the performance having been interrupted by "the act of God."

BETTS, J. The Court has already decided upon the demurrer in this cause, that the contract set up in the libel was one for the non-performance of which the libellant is entitled to a remedy in this Court against the vessel herself.

It appears to me that the testimony adduced by the libellant upon the hearing substantiates the material allegations of the libel. The only important ground of defence upon the facts is, that there was no breach of the contract, but only a delay in its fulfilment, arising from "the act of God."

The facts shown in support of this defence are, that while the vessel was engaged in taking on board the cargo of brick, the master was injured by a fall, in consequence of which he died a few days afterwards. During the time he survived and remained on board the vessel, the physicians forbade the loading to go on, because of the injury likely to result from it to him in his enfeebled condition. He was carried round in the vessel, from the place she lay, to the foot of Hammond Street, in this city, and there landed. Had the vessel returned to her previous station immediately after landing the master, she might, as the evidence shows, have completed her loading, and have conveyed the entire cargo to Brooklyn, its place of destination, without impediment from the weather; but she delayed several hours needlessly at Hammond Street, and was in consequence frozen in at that dock, and thus prevented going on with the execution of the contract until after this suit was commenced. The libellant sent an agent to confer with the owner in respect to the completion of the contract, and on the first interview the owner manifested a

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disposition to continue and fulfil the undertaking entered into by the master; but upon the second application to him he positively refused to do so.

I do not think the short delay at Hammond Street, although followed by the freezing in of the vessel, could have operated as a breach of the contract; and if the owner had proffered a fulfilment on his part, to be made as soon as the vessel could be extricated from the ice, (*Bowman v. Teal*, 14 *Wend.* 215; *Parsons v. Hardy*, 23 *Ib.* 306,) I should have regarded him free from liability as for a wilful neglect to perform it. Under the circumstances of the case, he would be entitled to a fair indulgence for time, both to replace the master and also to await the relief of the vessel from her confinement in the ice, had *reasonable exertions* been used by the owner to complete the undertaking for the vessel. *Story on Bailm.* § 545 *a*.

But instead of thus offering to complete the agreement as soon as performance should be within his power, the owner repudiated his obligation, and positively refused to fulfil it at any time. This refusal is the gist of the owner's defalcation, and properly subjects the vessel to the consequences of not performing the engagement made by the master. There was no *vis major* or inevitable accident which released the vessel from proceeding in a reasonable time to complete the undertaking. The owner having taken the ground that he would not perform that engagement at all, the libellant became entitled to proceed against the vessel, and to recover the damages incurred by reason of the violation of the contract already entered upon, and in part executed.

In respect to that portion of the cargo which was taken to the vessel and not received on board, the libellant may rightfully claim the reimbursement of the expenses of transporting it from his storehouse to the ship at the dock from which it was to be laden on board, as well as compensation for any injuries received by the cargo while it lay there awaiting the convenience of the vessel to receive it on board. It must

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from that time be considered as delivered alongside the vessel, and the shipment, so far as libellant was concerned, must be taken to have been then completed. But it not having been received on the vessel, there may be a question whether the ship is responsible for its value, or for the subsequent expenses incurred in removing or securing it ashore—the libellant having been expressly notified by the owner of the vessel that he repudiated the contract of the master for its transportation. If the libellant elected to leave his property exposed after that notice, the loss consequent upon that exposure must be recovered for against the owner personally, and not by action against the vessel in damages for the violation of his contract of carriage. The damages in that respect, for which the vessel is liable as consequent to the neglect to transport the whole cargo offered the vessel, would be the expense incurred by the libellant in procuring the delivery at the place of its destination of that portion which was left behind, as being incidental to the placing it under the control of the vessel; but not the consequential damages flowing from taking charge of it on land after it was abandoned.

The value of the brick laden on board the vessel, and not conveyed and delivered according to contract at the time the suit was instituted, is a lien upon the vessel, and must be satisfied by her. 3 *Kent*, 162, 218. I find it stated, upon the brief of the claimant's advocate, that that part of the cargo has since been delivered according to the agreement. This, however, does not appear upon the proofs, and accordingly the value of that part of the cargo must be inquired into upon a reference, and the libellant must receive compensation for the amount in the final decree.

Reference ordered.

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In Admiralty no decree can be rendered upon proofs merely, when the subject-matter of those proofs is not embraced within the pleadings. The decree must conform to the *allegations* of the parties.

The maritime courts of this country and of England are not without jurisdiction over actions, whether *in rem* or *in personam*, between foreigners.

But as a general rule, both the American and the English courts will decline to entertain such actions, excepting where it is manifestly necessary that they should do so, to prevent a failure of justice.

The Act of 7 & 8 Vict. c. 112, § 17—authorizing the recovery of seamen's wages notwithstanding the loss of the ship before earning freight, provided the seaman shall produce a certificate to the fact that he exerted himself to save the ship, cargo, &c.;—does not operate to create a new right of action formerly unknown, but only by way of removing a disability which the rules of maritime courts previously imposed.

Hence the action, in such cases, is not upon the statute, nor upon any right created thereby, but upon the contract to pay wages.

In an action for wages brought since the Act of 7 & 8 Vict. c. 112, the production of the certificate mentioned in the act is not required as an absolute condition precedent to a right of recovery by seamen, but is directed as a mode of proof which shall be sufficient, other legal means of evidence to show the fidelity of the seamen, and their title to wages, not being excluded.

After a full hearing, and the decision of the Court that the action is not sustained by the proofs, as the pleadings stand, it is competent to the Court to permit parties to amend their pleadings, so as to embrace the merits of the case.

THIS was a libel *in personam*, by Thomas Davis against John Leslie, master of the ship *Virginus*, to recover seaman's wages, and the value of wearing apparel lost in the wreck of the ship.

There were six other suits arising out of the same facts, and involving the same questions. Five of the seven suits were brought against the master, and two against the owner of the *Virginus*.

The facts of the case sufficiently appear in the opinion of the Court.

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Alanson Nash, for libellant.

I. This is the case of a British vessel, commanded by a British master, manned by British seamen, and sailing under the British flag, and lost in British seas. The men are entitled to the benefit of British laws, and in particular to the privileges given by section 17 of the 7 & 8 Victoria, c. 112, which provides that in case a vessel is wrecked or lost at sea, the men may recover their wages up to the time of the loss.

II. The law of a place where a contract is made or to be performed is to govern as to the *nature, validity, and effect* of such contract; that being valid in such place, it is to be considered equally valid and to be enforced everywhere, with the exception of cases in which the contract is immoral, unjust, or where the enforcing of it would be injurious to the rights of our own citizens. *Lodge v. Phelps*, 1 *Johns. Cas.* 139; *Smith v. Smith*, 2 *Johns.* 235; *Ruggles v. Keeler*, 3 *Ib.* 263; *Thompson v. Ketcham*, 4 *Ib.* 285; *Sherrill v. Hopkins*, 1 *Cow.* 103, and cases cited, *Ib.* 105–109; *Van Schaick v. Edwards*, 2 *Johns. Cas.* 385; *Masson v. Lake*, 4 *How.* 262; *The Alexandria Canal Company v. Swan*, 5 *How.* 87. Thus a contract of marriage, though invalid by our laws, will be held valid here if valid by the law of the place where made, and if not contrary to the laws of God. *Decouche v. Savetier*, 3 *Johns. Ch. R.* 190. So, if one lawfully sell goods in a foreign country, in a manner or on grounds not lawful here, our Courts will uphold the sale. *Grant v. McLachlin*, 4 *Johns.* 34. So the rate of interest is governed by law of place. *Fanning v. Consequa*, 17 *Johns.* 511. So of the liability of a party to negotiable paper. *Hicks v. Brown*, 12 *Johns.* 142; see, further, *Masson v. Lake*, 4 *How.* 262; *The Alexandria Canal Company v. Swan*, 5 *How.* 87. The general rule upon this subject is, that the law of the place where the contract is made, is to control its construction, unless it appear on the face of it that it was to be performed at some other place, or was made with reference to the laws of some other place;

and the reason of the rule is the supposed reference which every contract has to the laws of the State or country where it is made, or where it is to be executed, whether the parties are citizens of that State or country, or not. *Sherrill v. Hopkins*, 1 *Cow.* 108.

The libellant asks the Court to decide these two sets of causes according to the British law, and not according to the decisions of causes in the United States Courts;—they ask the benefit of the *lex loci contractus*.

III. The British statute being thus shown to be applicable, ought to receive an equitable construction. By equitable construction a statute may be applied to a case not within its letter, but within its meaning, on the ground that the case is within the mischief for which it was intended to provide a remedy. *Platt v. The Sheriff of London*, *Plowd.* 36; *Eyston v. Studd*, *Ib.* 467. A remedial statute may be applied by equitable construction whenever it was manifestly the intention of the law-givers to embrace within the operation of the statute such a case as that in question. Remedial statutes should be construed liberally. 3 *Coke's Inst.* 381; *Vanhook v. Whitlock*, 2 *Edw.* 304; *St. Peter's of York v. Middleborough*, 2 *Younge & J.* 196.

IV. The mischief sought to be remedied by the British statute was two fold. 1. Although the seamen might perform their duty faithfully, yet when the vessel was lost on the voyage, the whole of their wages were lost. This led to carelessness and indifference on the part of seamen, and often to total loss of the vessel and cargo. To remedy this evil, and give the mariner what he had honestly worked for, and of which he should not be deprived, except for his own act, this statute was passed. It still requires him to exert himself to the utmost, and in such exertion he risks his life momentarily; but it gives him, while thus working, the knowledge that if he is not able, though willing to save his employer's property, he will not be deprived of the fruit of his honest labor and

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peril, unless for his own conduct. In the present case the men did every thing that could be done; they were placed, by the negligence of the owners, under a captain who, as the testimony shows, was at least careless in preparing for sea, and who, on the appearance of danger, left his crew at the first opportunity, to struggle through the danger as best they might. 2. Seamen cannot insure their wages, but an owner may his ship and freight, (out of which the men are paid,) thus making it for his advantage that the vessel should be lost. This statute certainly removes this temptation, and diminishes the temptation to destroy the ship for the insurance upon her, and in that view is certainly for the benefit of all concerned; it leaves the risk of the voyage with the party who may insure it, and relieves the generally penniless sailor of the risk, that after working and perilling his life for six months or longer, his money may go into the owner's pocket, in the shape of insurance, without the opportunity of making such owner respond for the services and risks he has undergone.

V. The seamen ought not to lose the remedy given them by the act, by reason of their inability to procure the certificate of the master to their faithful service, as prescribed, even if the production of such certificate is to be regarded as a condition precedent to the right to the relief granted. A party is not to be deprived of a right, by failure to perform a condition, where such performance is out of his power, especially where, as here, the condition is substantially though not literally performed; the *deposition* of the master to the faithful service of the crew being as reliable evidence as his *certificate* could be. Thus the act of God will excuse the performance of a condition. *Hughes v. Edwards*, 9 *Wheat.* 345; *Merrill v. Emory*, 9 *Ib.* 489; 8 *Cow.* 299; 10 *Pick.* 507; *Rolle's Abr.* 450. So he who prevents the performance of a condition cannot take advantage of its non-performance. *Williams v. The Bank of the United States*, 2 *Pet.* 102; 1 *Bibb.* 380; 2 *Ib.* 437.

VI. Independently of the British act cited, the libellant might recover under the general maritime law. *Abbott on Shipp.* 750; *Col. Laws of Mass.* 1668; *Laws of Oleron*; *Laws of Wisbuy*; *Laws of the Hanse Towns.*

W. Mulock, for respondent.

I. A total loss of the vessel being established, this Court has decided that, by the law maritime, the claim for wages is gone by a misfortune common to all concerned.

II. The statute of Victoria, relied on, is a matter of fact of which no proof is given, and of which this Court, without consent or evidence, cannot take cognizance. A commission or evidence might show that it was repealed or inoperative.

III. All navigation laws are enacted for the benefit of commerce. This case of a total, hopeless loss, when the vessel was "water-logged" in the ocean, "off the banks of Newfoundland," and "loaded with timber," no hope of saving any thing from the wreck being proved, the defendant having even "lost his clothes," cannot come within the policy or scope of the statute.

IV. But at all events, no force of construction can apply this statute in a personal action against the master. He is liable under his contract only, and the statute is silent as to him. There is a certificate required, which is not produced; and the statute requisition shows it applies to owners only.

BETTS, J. This is one of seven suits *in personam*, prosecuted by the crew of the British ship *Virginus*—two against the reputed owner of the ship, and five against her master—to recover the wages of the men and the value of their wearing apparel taken on board and lost with the ship.

The parties have stipulated that the seven suits shall stand as if consolidated.

In respect to the two suits against the alleged owner, it is

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sufficient to say that the allegations of his ownership were wholly disproved upon the hearing, and the libels against him must be dismissed for that reason.

In the remaining five suits there are several questions which require consideration.

It appears that the ship sailed from Quebec for Liverpool about September 13, 1847, and encountered a gale early in October; and after riding it out for three days, became water-logged, and on or about October 9, was abandoned by the officers and crew when on the point of foundering. The officers and crew were received on board two other vessels then in sight, lying to for them, the *Virginus* having hoisted a signal of distress. The libellants demanded wages for the full period of service on board, at the rate of thirteen pounds sterling each man per month, and also payment for their clothes, &c., lost in the wreck.

The libels charge that the ship was *unseaworthy* when she sailed, and was lost in consequence thereof. There is no allegation, either in the libel or answer, which has any relation to the fact of services having been rendered to the ship as a wreck, such as—under the operation of the act of 7 & 8 Victoria, by the aid of which it was sought upon the argument to sustain the action—would save the seamen their antecedent wages. The whole case is put by the libel upon the ground that the ship was *unseaworthy* when the voyage commenced, and the answer avoids all averments or allegations whatever in regard to the services or conduct of the seamen on the voyage, or at the time of the wreck. Upon this point I am clear that no cause of action has been made out by the libellants. The charge of unseaworthiness is wholly unsustained. The ship was in a sound and safe condition and fitment for the voyage; and if any color of fault is shown, it respects only the prudent and correct management of the master after she left port. The evidence to that point is exceedingly feeble and unsatisfactory, and is far short of

establishing any act of gross negligence, or the want of competent skill in navigating or keeping her seaworthy on the voyage.

It is a cardinal rule in Admiralty proceedings, that no decree can be rendered upon proofs alone, when the subject-matter of those proofs is not essentially alleged in the pleadings.¹ The decree of the Court upon the case, in its present aspect, must therefore be against the claim preferred by the libellants to recover upon the ground of unseaworthiness, wages for the whole duration of the employment contemplated by their shipping contract. But the impressive equity of the libellants' case to the protection of the act of Parliament, and to the relief provided under it, being manifest, and the questions having been fully argued upon both sides in respect to the character and operation of the remedy given by the statute, I deem it proper to state my opinion respecting the application of the provisions of the act to the state of facts disclosed by the proofs now before me, with a view either to terminate the litigation here, or to place the libellants in a condition to have the advantage of the statute in support of their rights.

The general rule of maritime law is, that seamen lose their wages *in toto* in case of the wreck of the ship upon her voyage; and this rule prevailed equally in the American and English courts, (*The Sophia*, *Gilp*. 77; *The Neptune*, 1 *Hagg. Adm. R.* 239; *Abbott on Shipp.* 790; 3 *Kent*, 187,) until modified in England by the statute of 7 & 8 Victoria, c. 112, § 17. By this act it is provided that in all cases of the wreck or loss of the ship, every surviving seaman shall be entitled to his wages up to the period of the wreck or loss of the ship, whether such ship shall or shall not have previously earned

¹ The decree of the Court must be *secundum allegata et probata*. See *The Steamboat Rhode Island*, *Olcott*, 505, and authorities there cited.

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freight, provided the seaman shall produce a certificate from the master or chief surviving officer of the ship, to the effect that he had exerted himself to the utmost to save the ship, cargo, and stores.

This is a most wise and salutary substitute for that old figment of law which has in many cases been most oppressively enforced against seamen, that "freight is the mother of wages;" so that, where no freight is earned, no wages can be recovered. See *Dunnett v. Tomhagen*, 3 *Johns*. 154; *The Elizabeth and Jane, Ware*, 41; *Abbott on Shipp.* 760. And the *Virginus* being a British vessel, the crew British subjects, and the contract one entered into in the British dominions, with a view to execution therein also, the law of Great Britain must prescribe the rule by which the operation of the contract, with the benefits and disadvantages accompanying it, are to be determined. *Masson v. Lake*, 4 *How.* 278, and cases cited; *Story on Confl. L.* § 279.

The libellants bring themselves clearly within the spirit and equity of the act of Parliament referred to. The vessel was lost by *vis major* in a violent storm at sea, and during her peril, and up to the moment of her foundering, the crew rendered every exertion in their power to save her. The master and mates left the ship in the ship's boat after her condition was hopeless. The crew were subsequently taken off by other vessels lying to for their rescue, and the ship went down immediately afterwards. The peril was so imminent, that when a chance of escape was presented, no attempt was made to save more than the lives of the ship's company. It is also shown that the mates received their pay in full or in part, after their arrival in this port, and by drafts of the master on the owners in Ireland.

If, then, the seamen presented the certificate of the master, pursuant to the proviso of the act, there could be no doubt that the proper tribunal would award them wages, notwithstanding the wreck and total loss of the ship at the com-

mencement of the voyage and before any freight had been earned.

Two objections are, however, presented to the recovery of those wages in this action:—

1. That the Court will not take jurisdiction of an action for wages earned in a foreign vessel, and prosecuted wholly between aliens, and based upon a statute of their own country, granting them a right of action in a case in which it would not exist according to general principles of law common to all courts of maritime jurisdiction.

2. That the libellants do not produce the evidence prescribed by the statute, as that which will alone justify an award of damages to them.

I do not think the first objection, that the Court is without jurisdiction of a suit for wages between foreigners, so far as it rests upon the idea that foreigners are without a standing in Court, can be maintained. There has been, on the part of maritime courts, both of England and America, a very general disinclination to entertain such suits, and they have in several cases *declined* to take jurisdiction, in language which almost amounts to a *denial* of the power to take it. But I understand the weight of authority in both countries to be, that upon the one hand the Courts are not without ample power to hear and determine such suits, when the circumstances of the case before them seem to render it fit that they should do so; while, upon the other hand, they are not bound to do this, but will, in general, from motives of international comity, of delicacy, and of convenience, decline the suit. In other words, the foreign libellant is regarded as not entitled to invoke the powers of the Court, as matter of absolute right; yet where the Court is satisfied that justice requires its interposition in his favor, those powers may be, and will be, exercised in his behalf.

That there is vested in the Court at least a latent jurisdiction over these actions, which may be exercised under the

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guidance of a sound discretion, seems to be clearly shown by reference to those cases in which, both in England and America, suits between foreigners have been entertained in Admiralty, on the ground of a special necessity. The *Courtney*, *Edw. Adm. R.* 239; The *Wilhelm Frederick*, 1 *Hagg. Adm. R.* 138; *Ellison v. The Bellona*, *Bee's Adm. R.* 112; *Willendson v. The Försöket*, 1 *Pet. Adm. R.* 196; *Moran v. Bauden*, 2 *Ib.* 415; *Weibery v. The Oloff*, *Ib.* 428.

The very question has, moreover, been brought under thorough discussion in England, as recently as 1840, in the case of *The Golubchick*, 1 *W. Rob.* 143. This case was a libel *in rem* for wages. The master appeared under protest to the jurisdiction, grounded on the fact that the suit was between foreigners. In delivering his opinion against the protest, Dr. Lushington reviews the previous English cases on the subject, and thus expresses the views taken by himself:—

“Upon general principles, I am inclined to hold that this Court does possess a competent jurisdiction to adjudge in these cases;—at the same time the exercise of this jurisdiction is discretionary with the Court; and if the consent of the representative of the government to which the vessel belongs is withheld, upon reasonable grounds being shown, the Court must decline to exercise its authority. Indeed, circumstances might occur upon the face of the case itself in which this difficulty might arise, that the matter in dispute was so connected with the municipal law of a foreign country, that this Court would be incompetent to render impartial justice; in such cases, undoubtedly, the Court would decline to adjudicate.”

The cases in this country, upon the whole, sustain the same doctrine.

In *The Jerusalem*, 2 *Gall.* 191, the libellant sought to recover upon a bottomry bond upon a foreign ship. The parties were both subjects of the Sublime Porte, and the claimant appeared under protest to the jurisdiction. Mr. Justice

Story held that a proceeding *in rem* might be maintained in our courts against property within our jurisdiction, although the parties were foreigners. And although he waives any decision of the question as to jurisdiction in personal actions, he intimates a decided opinion, that even in respect to the personal action for wages, the jurisdiction of the Court is clear, while the policy of its exercise in particular cases may be matter of question. This view is approved by Dr. Lushington, in a supplementary opinion in the case of *The Golubchick*, already cited.

In the case of *Thompson v. The Ship Nanny, Bee's Adm. R. 217*, the Court declined to entertain the cause, but rested the decision entirely upon the equities of the case, and held, that while there should be great caution in the exercise of jurisdiction as to foreigners, unless under peculiar circumstances, yet such jurisdiction ought not to be relinquished where it may appear proper or necessary to prevent a failure of justice.

So in the case of *Johnson v. Dalton*, 1 *Cow.* 543, which was an action by a seaman against a master, both foreigners, for assault and battery, committed on shipboard, the Supreme Court of New York sustained the jurisdiction. They say: "Our courts may take cognizance of torts committed on the high seas on board a foreign vessel; but on principles of comity, as well as to prevent the frequent and serious injuries that would result, they have exercised a sound discretion in entertaining jurisdiction or not, according to circumstances."

These cases sufficiently sustain the view which this Court has already taken in one or two cases¹ formerly before it, and which certainly rests upon sound principle, that this Court is not without power to adjudicate upon a controversy between foreigners, although such suit is *in personam*; while at the same time, as this class of actions tend to embarrass and in-

¹ See *The Napoleon*, *Olcott*, 203.

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interrupt the navigation and business of foreign vessels visiting our ports, I fully recognize the right and duty of the Court, upon general grounds of propriety and expediency, to decline such jurisdiction, where not induced to its exercise by a clear necessity. It seems, indeed, to be the settled understanding and course of courts of Admiralty, as already intimated, not to permit their jurisdiction to be invoked as matter of right, to sustain suits brought by foreign seamen against masters or owners being also foreigners, or against foreign vessels. In England, indeed, the assent of the representative of the government to which the seamen belong is required before the courts will proceed to entertain jurisdiction. The *Wilhelm Frederick*, 1 *Hagg. Adm. R.* 138; *Edw. Adm. Jur.* 128. But in the courts of the United States this precautionary condition is not required; and jurisdiction will ordinarily be exercised if the voyage has been terminated by full completion or abandonment, or if the contract of hiring is dissolved by the wrongful act of the owner or master. Where, on the contrary, the vessel to which the seaman belongs is still in the prosecution of the voyage, and the shipping contract remains in full force, the Court will in general decline taking cognizance of the case, and will remit the parties to the tribunals of their own country, unless the commercial representative of that nation asks the aid of the Court in the seamen's behalf. Two decisions of a contrary import, in the District Court of Pennsylvania, (*Moran v. Baudin*, 2 *Pet. Adm. R.* 415; *Ib.* 495,) are of questionable authority, unless placed upon the ground that the seamen were not proved to have been duly bound to the vessel.

The present case appears to me to come fully within the principles recognized by this Court, as authorizing it to take cognizance of a suit for wages between foreigners—the voyage being broken up and the seamen left unprovided for in this country.

But the objection urged to the jurisdiction in this case was

rested in part upon the idea that there were peculiar reasons for declining the jurisdiction of an action between foreigners, where it was based upon a statute peculiar to their own country, giving them a right of action unknown to the general maritime law of the world. It is a sufficient answer to the objection, in this aspect, that the present is not such an action. The claim of the libellants, in the present case, arises out of the general maritime law, and not out of the municipal law of Great Britain. The action is not upon the statute, or upon any right created by the statute, but upon the contract to pay wages for the services upon which the libellants were employed. The act of Parliament does not operate to create a new right of action, but only by way of removing a disability which the rules of maritime courts previously imposed on seamen, in respect to wages already earned under their contract, in cases where, by the misadventures of the voyage, the ship was wrecked and totally lost. They were disabled under the former rule in such cases from proceeding against the master or owner for the recovery of earnings, which they would clearly be entitled to by the terms of their hiring. That this was a disability imposed upon mariners by an arbitrary rule of law, and was not a condition adopted by them so as to enter into their contract of hiring, and that the wages were deemed actually earned in cases of wreck, is abundantly manifest; from the reason uniformly assigned for the rule, namely, that public policy required that the law should create in the sailor the highest possible interest in the salvation of the vessel and cargo; and also from the doctrine that every thing belonging to the owner, saved from the wreck, both remnants and freight, was chargeable with the payment of these wages. This qualification of the rule in some degree assuaged its severity, and it furthermore establishes the principle that wages were regarded as earned, and justly due, wreck or no wreck, and that the calamity did not operate to extinguish the meritoriousness of the sailor's service, or to abrogate the

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right vested in him, or to defeat a condition upon which that right depended; but that it merely sheltered the ship-owner against being compelled to pay wages according to his promise, in case he had the misfortune to lose his ship. The act of Parliament then operates to relieve British seamen from this partial rule of the former law. The right to wages notwithstanding a wreck, stands upon the same footing as before,—on the fidelity of the seamen, and their prompt and efficient aid to the ship and cargo, to the utmost of their ability. The *Sidney Cove*, 2 *Dods*. 13; The *Neptune*, 1 *Hagg. Adm. R.* 227; The *Lady Durham*, 3 *Ib.* 96; *Abbott on Shipp.* 229. Nor do I apprehend that any evils are likely to arise from this change of the law; for so far as the old rule was founded upon a supposed necessity to stimulate the fidelity of seamen by appeals to their interest, that object is sufficiently attained by leaving it still most important to mariners to save the ship and cargo, in order to secure a certain remedy for their wages.

The facts in evidence having brought the libellants clearly within the equity and spirit of the enacting clause of this act of Parliament, the further question was raised at the hearing, whether the libellants could have the advantage of that statutory provision, without producing the specific proof designated by the proviso;—viz., the certificate of the master or chief surviving officer of the ship, to the effect that the libellants exerted themselves to the utmost to save the ship, cargo, and stores. The proviso is evidently a wise precaution and safeguard, both in respect to the maintenance of the authority of the officers of a vessel over the crew, in cases of wreck, and also as a check upon groundless suits which sailors might institute against owners, after the loss of the ship and cargo. Whether, in that class of actions, the proviso is to be understood literally, and enforced in its strict sense, is a question which is not now raised. The present is an action against the master, and the question is as to the proper construc-

tion of the proviso in its application to that class of suits only.

The elementary principle governing the construction of statutes is, that the will of the legislature, as manifested in the plain sense of the enactment, is to be carried into effect; and so as, if possible, to secure operation to every part of the statute. The Courts will avoid, if possible, placing upon any one clause or part of an act such a construction as will necessarily abrogate another part; and especially a qualification or limitation will not be extended by force of construction so as to supersede or annul a substantive enactment. 19 *Vin. Abr.* 519, tit. *Statutes*, E. 6, 81-93. It is said that a *proviso* directly repugnant to the enacting clause of a statute, repeals it, because, if in absolute contradiction, the last expression of the legislative will is the one which must prevail. 19 *Vin.* 522, tit. *Statutes*, E. 6, 105. Although it is also laid down as the rule, that a *saving* in an act of Parliament, which is repugnant to the body of the act, is void. Case of Alton Woods, 1 *Coke's R.* 47, and cases cited; 1 *Blackst. Com.* 89. And there is very high and satisfactory authority for considering an exception and a saving attached to an enacting clause as being, in effect, one and the same thing, except, perhaps, as to manner of pleading.

The proviso under consideration, if taken in its absolute sense, would render the enacting clause of the statute nugatory in many cases clearly within the contemplation of the legislature, and in which, it is to be supposed, the act was specially designed to have effect. Thus, where, in cases of shipwreck involving meritorious efforts on the part of the crew to save the ship and cargo with the lives of the ship's company, the lives of all the officers are lost, the survivors of the crew must be deprived of the benefits of the act, if the strict and exact observance of the proviso is to be required, because of the impossibility of supplying the written certificate demanded by its terms. So the case of the fraudulent

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stranding or destruction of the vessel by the officers; or of the obstinate or wrongful refusal of the proper officers to give the certificate, although incontrovertibly merited by the seaman; or of the removal of such officer from the reach or knowledge of the seaman, are some instances of cases which must be of common occurrence, in which a compliance with the exact terms of the proviso would be impracticable, whatever might be the efforts or merit of the mariner. The present case also supplies a forcible illustration of the injurious effect of giving the proviso such a construction as leaves the seaman remediless, except upon production of the specific species of proof contemplated. The master admits the two mates to be within the protection of the statute, and pays their wages. They testified that the sailors performed like services with themselves on board the ship, for days and nights in a gale of wind, and after the vessel was waterlogged, and to all intents a total loss. The captain refuses or neglects to pay their wages, and when sued, defends himself by setting up his own omission or refusal to give the certificate which would insure their recovery. To hold that the production of the certificate was absolutely essential to authorize the Court to award the recovery which the act permits, would practically nullify the benevolent purpose of the law, and render its professed liberality a mockery, inasmuch as the statute, under such an interpretation, would secure the seaman little broader right than that which he has always enjoyed—the right to receive wages, if paid to him voluntarily by the master or owner.

Upon these grounds, and in the light of the views previously expressed respecting the principle upon which the act in question is to be regarded as based, I am of opinion that the construction of the proviso contended for cannot be maintained. I do not think it imposes an absolute condition precedent to the right of recovery. It introduces no new requirement of duty to be performed by the seamen. The law mar-

itime exacts of them the same diligence and fidelity of service throughout the whole period of their employment. Although the voyage may be uninterruptedly prosperous and safe, yet the mariner who, upon any occasion, from its inception to its close, shall refuse to exert himself to his utmost in the discharge of his duties on board, will either entirely forfeit his wages for the voyage, or become subject to damages or mulct in diminution of them. The proviso designates a mode of proof, which is the primary and highest evidence of the fact to be established, but secondary evidence is not excluded expressly, and the equitable and salutary purposes of a remedial and eminently beneficial statute will not be defeated by a construction which is strictly technical. *The People v. The Utica Insurance Company*, 15 *Johns.* 358; *Wilkinson v. Leland*, 2 *Pet.* 662. The construction should be liberal, in order to give effect to the remedy. *Whitney v. Emmett*, 1 *Kent*, 465; 1 *Baldw. C. C. R.* 316; *Dwarris on Stats.* 707-736. The mode of proof designated is one over which those to be benefited by the provision have no control, nor is there any process furnished them to enforce the giving the certificate. It is the sole act of the master, and I think there is cogent reason for holding that, by the true import of the section, this important act of justice to mariners is not to be left to the master's discretion or to his interest or caprice; that it is his duty, in a case coming within the statute, to furnish the certificate, or to show satisfactory reasons for not doing so, otherwise the Courts will accept other evidence as a legal substitute for the certificate, regarding the proviso as alike directory to the master and to the men. This is in consonance with the principle applied in analogous cases.

As the cases now come up they must be decided against the libellants; but I shall allow them the privilege of amending their libels, and of taking new proofs under allegations appropriate to give them a remedy under the provisions of the act of Parliament, reserving any definite opinion upon their

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rights and remedy upon the facts as they may ultimately be proved, until the full case is heard. The amendment, however, must be at the expense of paying the respondent his taxed costs, because, in the only matter litigated, his defence is perfect against the right of action.

The following decree must, therefore, be entered in each of the five causes against the master.

It appearing to the Court that the libellants have not, by the proofs in this case, shown that the ship *Virginus* was unseaworthy, when she sailed on the voyage in the pleadings mentioned; and it further appearing unto the Court, that the said ship was wrecked and totally lost at sea, by perils of the sea, on her voyage, and without earning any freight on said voyage:—

It is considered by the Court that the libellants have established no right of recovery against the respondents upon the pleadings in this case.

But it further appearing to this Court that the libellants remained with the said ship after she was water-logged and wrecked, exerting their utmost efforts in saving the said ship and cargo, and the lives of the ship's company; and it further appearing to the Court that the parties to this action are British subjects, and the said ship is a British vessel, and that by the provisions of an act of Parliament, British seamen, serving on board of British vessels, under circumstances therein specified, may be entitled to their wages, notwithstanding the wreck and loss of the vessel, or her failing to earn freight; and it further appearing to the Court that the libellants have not so framed their libel and allegations in this case as to have advantage of such provisions of said act, if they can prove themselves entitled thereto:—

It is ordered and decreed by this Court that the libellants have leave to amend their libel in this behalf, on payment of the taxed costs of the respondent, for his answer filed in this cause, for his proofs taken therein, and also upon the final hearing.

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But it is further ordered, that each party be at liberty, at his election, to use on the amended pleadings the proofs already taken by depositions, so far as the same may be applicable; and if the respondent elects so to use the testimony taken in his behalf, then the expense of the same is not to be allowed him in the taxation of costs hereby awarded.

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The practice of the English Admiralty and the former practice of the District Court, in respect to the security required to be given by a respondent arrested upon bailable warrant, in order to authorize his discharge from the arrest,—stated.

The standing Rules of the District Court relating to bail stipulations to be given on the execution of a warrant *in personam*, and to the method of enforcing them, are superseded by the Supreme Court Rules of 1845, upon the same subject; and stipulations must now be exacted conformably to the Supreme Court Rules. A respondent, arrested in an Admiralty suit, is not entitled, upon the return day of the warrant, to be discharged from arrest, on giving a stipulation for *costs*, pursuant to the Rule of the District Court, but he must remain in custody until he gives bond or stipulation to satisfy the *decree* made against him.

The non-imprisonment act of the State of New York (1 *Rev. Stats.* 307, § 1) is made to be within this State the law of the United States also, by force of the acts of Congress of 1839 and 1841; (5 *U. S. Stats.* 321, 410;) but it does not embrace arrests upon process issuing out of a maritime court.¹ It is limited to civil process issuing out of *courts of law*, and executions issuing out of *courts of equity*.

THREE actions *in personam* were brought, by Joseph Gardner, Samuel Lockwood, and Mordecai T. Bunyan, respectively, against Michael Isaacson. The respondent was arrested on three warrants issued in the three causes, and was held in custody by the marshal. A motion was now made in each of the causes that the respondent be discharged

¹ See, also, the case of *Gaines v. Travis*, decided in this Court in January, 1849, and reported, *post*, in its order of date, where this question is further considered.

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from custody. The grounds upon which the motion was made appear sufficiently in the opinion of the Court.

Griffin and Larocque, for the motion.

W. Q. Morton and D. McMahon, opposed.

BETTS, J. The respondent having been arrested on bailable warrants *in personam*, issued out of this Court, in these three causes, and having given no bail to the marshal, was held in custody under the arrest.

On the return day of the warrant, the respondent entered into stipulations, conformably to the terms of Rule 38 of this Court, adopted in 1838; and a motion is now made in his behalf, that he be forthwith discharged. The libellants insist that the marshal is bound to retain the respondent in custody until bail-bonds or stipulations are executed pursuant to the Supreme Court Rules of 1845.

The question raised by the motion is, whether the respondent is entitled to his release, on giving stipulations, with sureties, that he will appear and pay all costs decreed against him, and will himself perform and abide all orders and decrees of the Court in the cause, or deliver himself personally for commitment in execution thereof,—such being the course of practice in this Court; or whether the rules adopted by the Supreme Court of the United States, in 1845, have established a different practice in this respect, which the respondent is bound to comply with.

By the practice of the English Court, as laid down by Clarke, and recognized by Browne, the respondent, on his arrest, is compelled to give bail to the marshal in a sum sufficient to cover the matter in demand, conditional for his appearance on return of the process. This stipulation was pronounced forfeited if he failed to enter his appearance on the day, and he was adjudged in contempt, and subjected to commitment or other process in satisfaction of the demand. This bail stipulation, it would seem, was originally regarded

as a penalty, and its forfeiture was by way of mulct, and accrued to the Admiral, and was not allotted to the satisfaction of the libellant.

The *appearance*, according to the condition of that bond, was effected by entering into stipulation *apud acta*, with approved sureties, *judicatum solvi*; that is, to satisfy the final and all interlocutory decrees of the Court in the cause.

These are the fundamental properties and effects of an *appearance* in the English Admiralty. *Clarke's Praxis*, tit. 3, 4, 5, 9, and 12; *Browne's Civ. & Adm. L.* 432. This was substantially so in the earlier maritime codes; (*Consolato del Mare*, c. 40;) and the regulations coincide with the course of the civil law in the same classes of procedure. *Wood's Civ. L.* 245. The doctrine has also been embodied a long time in the rules of American courts. *Dunl. Adm. Pr.* 144; *Greenl. Ov. Cas., App.* This Court, in its code of rules adopted in 1838, studiously varied the responsibility imposed on sureties by the antecedent practice. The appearance of the respondent was perfected by his becoming personally bound by stipulation to perform the judgment or decree rendered against him; but his sureties were placed on the same footing as those of the actor or libellant as to the amount they were to pay absolutely; in effect subjecting *fidei jussores* in Admiralty in the position of bail to the action at common law. They could not be charged beyond the costs accruing in the litigation, if the defendant surrendered himself for commitment under the final decree. *Betts's Adm. Pr.* 40; *Dunl. Adm. Pr.* 147; *Dist. Court Rules*, 21, 38, 39.

The act of Congress of May 8, 1792, § 2, (1 *U. S. Stats.* 276,) designated the forms of process, and the forms and modes of proceeding in suits at common law, in equity and Admiralty, with authority to the courts to vary them at discretion, "subject to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule to prescribe to any circuit or district court concerning the same."

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The act of August 23, 1842, § 6, (5 *U. S. Stats.* 518,) if it confers no more ample powers on the Supreme Court to regulate the practice of the district and circuit courts of the United States, yet manifestly implies a mandate on the Court to perform that duty.

In January Term, 1845, the Supreme Court exercised that power in relation to the practice of all the federal courts in causes of Admiralty and maritime jurisdiction on the instance side of the courts. 3 *How. Introd.* And accordingly those directions, in respect to *practice*, became the supreme law to all inferior courts, in the particulars regulated by them.

Rule 2 authorizes, in suits *in personam*, a warrant of arrest of the person of the defendant, in the nature of a *capias*, with an attachment clause against his property or credits, in case he cannot be found, or by a simple monition, in the nature of a summons, to appear and answer the suit.

Rule 3 provides, that when the warrant of arrest is executed, the marshal may take bail, with sufficient sureties from the party arrested, by bond or stipulation, upon condition that he will appear in the suit, and abide by all the orders of the Court, interlocutory or final in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation, summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

This is the established form of the undertaking of stipulators in the English Admiralty. *Marr. Form*, 272, 316.

The standing rule of this Court was, that on warrants to arrest the person in Admiralty and maritime causes, the marshal might take bail in the form of a stipulation, and in the sum endorsed on the warrant, conditioned for the appearance of the party on the return day to answer to the libellant in a

cause civil and maritime, according to the course of the Court. *Dist. Ct. Rules*, 21, 38.

These rules are superseded and displaced by that of the Supreme Court, before cited. The marshal can no longer accept stipulations pursuant to the District Court rule, but must exact them in the more comprehensive terms prescribed by the Supreme Court.

Again: The object of the stipulation directed by the rule of the District Court was to carry into effect the warrant of arrest, and nothing more. It contemplated no remedy beyond bringing the defendant personally before the Court, and retaining him under its authority.

When brought into Court, Rule 38 provided the manner in which the respondent should become a party litigant, which would perfect his appearance in the action. The subject-matter acted upon by Rules 21 and 38 of this Court is the same which is specifically regulated by Rule 3 of the Supreme Court: the latter determines the course of proceeding on the arrest, and before return of the process, and also the method by which the appearance of the defendant is to be entered and perfected.

The bond or stipulation to the marshal effects both, and after that is given, no further step is to be taken in Court in order to subject the respondent to its authority, or to secure the fulfilment of judgments or decrees, and this necessarily rescinds or dispenses with all other procedures to those ends.

The counsel for the respondent contends, that as he remained in custody of the marshal till the return day of the process, and *then* gave stipulations for his appearance, pursuant to the rules of the District Court, he is entitled to be discharged from arrest, and is not bound to execute the bond or stipulation prescribed by the Supreme Court rule, for three reasons:—

1. That the bond demanded is in the nature of bail to the sheriff on an arrest at common law, and cannot be exacted

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after the return day of the writ, as the party is then in Court, and the exigency of the writ is thus satisfied, and cannot act further in coercion of the defendant.

2. That Rule 46 of the Supreme Court saves in full force the application and effect of the District Court rules to an arrest so circumstanced, because the method of appearing is not fixed or regulated by any rule of the Supreme Court. .

3. That Rule 25 refers cases situated as these are, to the discretion of the Court, to compel stipulations to be given for costs only.

The analogy of the common-law practice is not a very close one ; but, so far as it goes, the argument from it rather tends to oppose than support the conclusion sought to be established by the respondent.

The bail to the sheriff is similar in character to the civil law stipulation *in judicio sisti*.

It only aims to secure the presence of the person in Court. But the sheriff is not exonerated merely by producing the body. He must hold the party in custody until another and more stringent undertaking is entered into by him, consummating his appearance according to the course of the Court, which is to abide there and perform the final order or judgment in the cause. So here, merely having the respondent under his authority on the return day of the process, or producing him *in facie curiæ*, in no way satisfies the mandate of arrest or exonerates the marshal. The process continues in life and acting upon the defendant, until it fulfils the purpose of the arrest, which manifestly is to compel him to furnish a stipulation in the terms given by the rule, and to that end his custody must necessarily continue until the appropriate stipulation is produced, because the mandate of arrest is *executed* and made complete in that manner alone.

In the view I take of the subject, the matter is specifically provided for by Rule 3 of the Supreme Court, and there is accordingly nothing in these arrests outside the provisions of

that rule, coming within the policy of Rule 46, and still remaining under the authority of this Court.

But it is insisted, for the respondent, that if this construction of the rules is adopted, that then Rule 25 of the Supreme Court supplies the law of these cases, and relieves the party and his sureties from liability other than for costs; and whether that obligation shall be exacted, is left to the discretion of this Court.

The terms of Rule 25 are, that in all cases of libel *in personam*, the Court may, in its discretion, upon the appearance of the defendant, where no bail has been taken and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation, with sureties, in such sums as the Court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof, or by any interlocutory order in the process of the suit.

This rule evidently has relation to the different modes of bringing a defendant before the Court designated by the second rule. If he is proceeded against by citation or summons only, there is no compulsory authority acting upon him, and the libellant has no security, either against his person or his estate, for the demand in prosecution. All that is imposed upon the defendant by the rules in such cases is, that he shall indemnify the libellant against the costs to be created by his interposing a defence and contestation to the action.

But in the coercive method of procedure by arrest of the body or attachment of property, the warrant being executed, Rule 25 can, in no just interpretation, be understood as intending to deprive the libellant of the security thereby acquired, and set the defendant or his property free from the attachment on a mere stipulation for costs.

Acting under the rule thus construed, the Court could not interpolate a condition that the defendant should also surrender himself for commitment; and if it is interpreted conform-

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ably to the claim of the respondent, a defendant need only, when arrested, refuse to give bail before the return day of the warrant, and then he will be entitled to a free discharge on intervening and giving a stipulation for costs, and thus all the privileges and securities provided by the rules of the Supreme Court, as consequent to his arrest, will be abrogated or evaded.

I am satisfied such construction of the rules cannot be sustained.

It was obviously the purpose of the Supreme Court to place the Admiralty practice, in each of the United States Courts, substantially on the same footing of the English practice. That practice, under the first process act, in 1789, was adopted by Congress. 1 *U. S. Stats.* 93. It had remained essentially the rule of practice since that period, in the various District Courts, but some deviations from it existed. 10 *Wheat.* 486. The Supreme Court designed, by Rules 2 and 3, to abolish such diversities of practice, and render the remedies and rights of parties uniform in causes of Admiralty and maritime jurisdiction, in all the courts of the Union.

The letter and spirit of the regulations of the Supreme Court, in my judgment, require that a defendant in custody, under a warrant of arrest in an Admiralty case, shall so remain until he makes his appearance by giving bond or stipulation to satisfy the decree that may be rendered against him.

It is urged that the acts of Congress abolishing imprisonment for debt govern this procedure, and that the federal courts have now no authority to hold parties under arrest on mere civil process.

The acts of 1839 and 1841, (5 *U. S. Stats.* 321 and 410,) abolish imprisonment for debt, on process issuing out of any Court of the United States, in all cases whatever where, by the *laws of the State* in which the said Court shall be held, imprisonment for debt has been or shall hereafter be abolished.

The act to abolish imprisonment for debt was passed in this State, April 26, 1831, and it enacts that no person shall be arrested or imprisoned on any civil process issuing out of *any court of law*, or on any *execution* issuing out of any *court of equity*, in any suit for the recovery of money, &c. 1 *Rev. Stats.* 807, § 1. This statute is made the law of the United States, also, by force of the acts of Congress above referred to, and had the proceeding in these causes been on the law side of the District or Circuit Court, the defendant would have been exempt from liability to arrest, and to give surety to perform the decree of the Court.

The principle of the act would seem to include arrests by maritime courts, (on matters of contract,) and for the recovery of money, no less than when made by courts of law. But the words of the statute do not embrace both. They are limited to *civil process issuing out of a court of law*, and the legislature found it necessary to provide expressly for executions *issuing out of Chancery*, as not embraced within the previous description of process from a court of law; much less can a maritime court be regarded as falling within the designation. The acts of Congress of 1789, 1792, and 1793, demonstrate that laws relating to the practice of courts of law, do not include that of Admiralty and maritime jurisdiction.

Non-imprisonment acts, of the tenor of that passed in this State, had been very common, indeed almost universal throughout the United States, previous to the promulgation of the code of rules by the Supreme Court in 1845. That Court, in framing these rules, necessarily construed those laws as not applying to proceedings in maritime courts, and accordingly the antecedent scope and effect of that description of process was left in force.

It is unnecessary, and might be unbecoming, after the action of the Supreme Court upon the subject, to intimate what order this Court might feel itself authorized or required to make, if the question as to the effect of those statutes upon

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its process had been brought to its consideration prior to the promulgation of the rules of the Supreme Court. That code must be regarded an authoritative exposition of the non-imprisonment acts in relation to Admiralty process. The duty of the inferior court is limited to receiving and executing the law given by its superior. The highest tribunal of the land having, since the enactment of those acts, established the process employed in this case, I shall forbear any further general reasoning upon the subject, and hold these warrants of arrest valid, and on all the points raised, deny the motion of the respondent for his discharge. *Order accordingly.*

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A bottomry creditor may, by payment of the seamen's wages, entitle himself to a novation in their place for recovery of their demands against the vessel.

But he has no right to exact of them a formal assignment of their wages, nor the payment of his proctor's fees; nor, on an offer to satisfy their wages, can he require them to defer the prosecution of their demands until he chooses to institute a suit on the bottomry.

On the discharge of a seaman, his wages become immediately payable; and the act of Congress of July 20, 1790, does not compel seamen discharged from their ship to wait until the expiration of ten days after the discharge of the cargo before bringing a suit.

It is inequitable for a seaman, knowing that the papers are ready for the immediate commencement of a suit by his shipmates for the recovery of wages earned on the same voyage,—or by a bottomry holder,—who sues also for a portion of the wages of the voyage, previously paid by him, to endeavor to supplant such action, by urging out, in his individual name, process in advance of it, so as to subject the ship or her proceeds to needless expenses.

Costs will not be allowed the seaman in such case, nor to others who unite in the proceeding instead of joining in the prior suit in progress.

When payment of wages is made to an American seaman at a foreign port, in foreign coin, on the sale of the ship, the breaking up of the voyage or the discharge of the seaman by the master, such coin is to be valued at its rate in the *home port*, under the laws of the United States; but foreign coin is to be estimated at its value at the *place of payment*, if the payment is a voluntary advance on the part of the master, made with the assent of the seaman.

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THIS was a libel *in rem*, filed originally by Charles H. Sanborn, against the ship Cabot, to recover wages.

The libellant was one of the crew of the ship Cabot, and had earned wages in the course of his employment on board her. The ship arrived at the port of New York from a circuitous voyage to ports in Europe and back, on December 28, 1847. No owner, nor any agent of an owner, appeared to take charge of the ship, or to pay her custom-house charges or other bills, and the master had no funds to meet them, or to pay the wages of the crew. The crew were discharged from the ship upon her arrival on the 28th.

On January 4, 1848, the crew were notified to appear on board the ship, in order to settle their accounts, and assign them to the holders of a bottomry bond on the ship. Nearly the whole crew attended at that time, and the parties concerned in this action were present among them. The accounts of the crew were made out and presented to them, and they agreed to the correctness of such accounts, and,—except one of the libellants in this suit, who admitted the correctness of the account, but refused to sign any papers,—they signed their names to the estimate of wages as then made up and stated on board. The crew were then directed to appear the next morning at the office of Mr. Sturtevant, the proctor of the bottomry creditor, they being informed that a libel would be prepared at that time and place, to be filed in their names against the ship for the indemnity of the bottomry creditor, and that on verifying the libel and assigning their claims of wages to the bottomry creditor, their wages would be paid in full. To this all the crew present assented. On the same afternoon, the proctor of the bottomry creditor paid off the wages of three of the crew, and on the next day, pursuant to the arrangement, he paid off in full the wages of those who assigned their demands as agreed.

The libellant Sanborn, called that day (the 5th of January) to see the paper he had signed, and asked for payment of his

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wages. The proctor refused to pay him unless he assigned his claim for wages to the bottomry creditor, as agreed upon; and, as Sanborn alleged, unless he also paid to him (the proctor) \$10 for his fees in the transaction. This was denied by the testimony of the proctor, and the evidence was strongly conflicting between the parties, on the hearing, whether the proctor exacted a \$10 fee from each seaman as a condition of paying their wages. The libellant Sanborn, refused to assign his claim or to pay the fee claimed; and on the same day he employed another proctor to prosecute his demand. A summons was obtained from a commissioner in his behalf, and was duly served on board the ship on the same day; and no one appearing on its return to show cause against its prayer, a certificate was given by the commissioner that there was sufficient cause of complaint whereon to found Admiralty process against the ship, and thereupon, on the 6th, a libel was filed in the name of Sanborn, and an attachment issued against the ship, upon which she was arrested. Before the attachment was issued, the proctor of the bottomry creditor, being apprised of the proceedings on foot, by the libellant, offered to pay him his wages in full if he would withdraw his suit. This offer the libellant refused to accept, unless his costs were also paid. The proctor refused to pay those costs, and no arrangement was effected between them.

On January 6th, four other members of the crew, Chambers, Thompson, Smith, and McVickar, filed each his separate libel *in personam* against the master of the vessel, for their respective wages earned on the voyage, and procured warrants of arrest to be issued thereon, returnable on the 11th of January. On the 7th, the warrants were filed, with the marshal's return indorsed, "that the respondent was not found," and on the same day those libellants filed their joint petitions, and obtained an *ex parte* order of the Court, making them co-libellants with Sanborn in this action. On the same day another libel was filed against the ship in the names of others

of the crew, and process of attachment was taken out and served upon her. The last two actions were instituted by the same proctor who commenced that of Sanborn. On the night of January 4th, a libel was prepared by Mr. Sturtevant, the proctor of the bottomry creditor, in the names of all the crew, against the ship for the recovery of their wages. This libel, pursuant to the arrangement made on that day with the crew, was the next day signed by nine of them, and the names of the parties prosecuting in this suit, and the allegations applicable to their demands were stricken out of it. On the 6th, a summons was taken out in favor of those nine libellants, founded upon the allegations of the libel so altered, and a certificate was given on the 7th by a commissioner, for process against the ship, and she was arrested thereon on the same day.

The matter was brought to hearing before the Court on the pleadings and proofs in these various actions. The claimant, in his defence to this action, relied upon the circumstances under which the action had been instituted by Sanborn as above stated ;—and he also claimed to charge various libellants with payments made them in foreign ports during the voyage, on account of their wages ; which payments were made in French five-franc pieces, at the rate of one dollar each, and also with payments of hospital money made on their account.

The action of the bottomry creditor had been carried to a final decree on the 8th of February ; a *venditioni exponas* was issued thereon, upon which the ship was sold, and her proceeds, \$4,300, were paid into Court on the 11th of February, subject to the rights of all the litigant parties.

The final decree in this cause, the one brought by Sanborn and others, was rendered on the 11th of February, three days subsequently to that in the bottomry suit, and the demand of the seamen who had filed their separate libel against the ship, were satisfied out of the proceeds in Court on the 14th of February.

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William Jay Haskett, for libellant.*Luther R. Marsh*, for claimant.

BETTS, J. The bottomry creditor had no authority in law to exact from the seamen a formal assignment of their claims for wages as a condition to the payment thereof. If he satisfied those claims in good faith, for the protection of his demand on the interest of the ship-owner, the Court might recognize in his behalf a novation *pro tanto* to those claims, and, upon the final decree, secure to him a reimbursement of such advance, as equitably united or compounded with his lien debt. But he had no right to compel the seamen to put themselves or their demands under his control, or to coerce from them the payment of his proctor's fees, or to require them to defer the prosecution of their demands until he chose to institute a suit upon his bottomry security. His extreme privilege would be to pay off the wages, and prevent the fund being diminished by costs to the seamen, for the recovery of wages alone, and in that manner to become permitted to tack their lien on the ship to his own, and sue for both in his own name and right, and burdened with but a single bill of costs. This was the legal relation of the bottomry holder to the crew.

The objection that the suit by the seamen was prematurely commenced, cannot be sustained. The action is under section 6 of the act of July 20, 1790, (1 *U. S. Stats.* 131,) which prescribes that if the wages of any seaman are not paid *within ten days* after the discharge of the cargo at the last port of delivery, the master may be summoned to show cause why a process *in rem* should not issue; and if cause is not shown, process *in rem* shall issue accordingly in the manner prescribed by the act. It is true that ten days had not expired after the termination of the voyage when the proceedings of the libellants were taken. But the crew were all discharged by the master of the ship on her arrival here on the 28th of Decem-

ber, and their wages thus became due and payable immediately. In such case the statute does not compel seamen to wait ten days before bringing suit for their wages. Such discharge from the ship terminates all connection of the seamen with the voyage, or with the unloading of the ship, and they are thereby remitted to their right of action by the law maritime. See *The Cypress*,¹ *MSS.* 1829.

But section 6 of the act of 1790 requires that in all suits under the act by seamen against a vessel for wages, "all the seamen or mariners having cause of complaint of the like kind against the same ship or vessel, shall be joined as complainants;" and, therefore, after proceedings are on foot in behalf of a part of the crew for the recovery of wages on the common voyage, it is not competent for others of the same crew to institute separate actions on their individual demands therefor. The ship is to be burdened with no more than the expenses of one prosecution, and those of the crew not named in the proceeding must cause themselves to be connected with the first action instituted, and the Court will regulate and distribute the costs between co-complainants in such proceedings, as may be equitable. It was irregular and against the equity of the statute, for the libellant Sanborn, after he was aware that a suit for wages for the voyage was in preparation to be immediately commenced by others of the crew, to attempt to supplant their action, and to place the business in the hands of his proctor alone, by getting his process on foot a few hours in advance of theirs; and as such proceeding was unnecessary and in his own wrong, it must be at his individual expense. He was also apprised that a fund was ready for the satisfaction of his wages; and after such notice, the commencement of a suit against the vessel by him singly must be deemed needless and vindictive, unless clear proof is

¹ Since reported, 1 *Blatchf. & H.* 83.

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given that it was indispensable to the protection of his interests, or that he had given previous notice that he would not await the proceedings of his shipmates. These steps might have given him color of claim to costs; but then he would acquire it only in case of unreasonable delay on the part of the others to prosecute their action.

The co-libellants of Sanborn, made such upon their own petition, after both suits were commenced against the ship, have no equity to costs. Not only were they equally bound with Sanborn to unite in the suit instituted and then in progress, in the name of others of the crew, or at least to have made a demand of payment out of the funds in the hands of Mr. Sturtevant, but their proceeding was manifestly vindictive, and with intent to create costs and to oppress the master and owners. They employed the same proctor to commence individual actions *in personam* against the master, and filed their several libels, and sued out process therein, and before the return day irregularly caused returns to be made by the marshal that the defendant could not be found, and thereupon procured themselves to be associated with Sanborn in the action against the vessel.

As the decree to be made in the cause will provide for payment of the balance of wages actually due to the libellants in this cause, though without costs, it is necessary to advert to the counter-claim or charges against those wages set up by the claimant.

The libellants received payments on account of their wages, while the ship was in foreign ports, which were made to them in five-franc pieces, each being reckoned as a dollar; and they insist that they should be charged with these pieces only at the valuation of ninety-three cents each, that being their value in the United States, by the act of June 25, 1834. 4 *U. S. Stats.* 681. The libellants had a right to receive their wages in American coin or its equivalent, whether paid them abroad or at home, if the master was bound by contract or act of

Congress to make the payment at the time,—the shipping contract being in that currency. It was stipulated by the articles that the crew should not be entitled to their wages, or to any part thereof, until the arrival of the vessel at her last port of discharge, and the delivery of her cargo. That was to be in an American port. Payments made to the libellants during the voyage would therefore be chargeable to them at the value of United States currency there, the mutual act of the parties being tantamount to an assent to make and receive payment abroad.

The five-franc pieces paid the libellants abroad, are accordingly to be credited to the ship, in making up their accounts, at the relative value of that coin to the American silver dollar, at the time and place where it was received by the seamen. That is, the crew were entitled to so much local currency as would procure at the place the American currency due them.

In respect to the claim for hospital moneys paid by the ship, whatever the sum may be, nothing can be charged the libellants therefor, beyond the amount fixed by law at the time of the payment. This is a compulsory tax charged upon them by positive law. Any sums paid by the master or owners exceeding that amount, must be his or their loss.

The decree will be that the libel be dismissed, but without costs. For the claimant not having made tender of wages to the libellants or paid them into Court, and having unnecessarily defended the action by answer and claim, when the interposition of the Court to stay the suit of the libellants, and to compel them to await the decree in that already in course of prosecution in behalf of their shipmates, could have been had on motion or petition, no costs can be awarded in their favor.

The action brought by the libellants will be regarded as tantamount to a petition upon the fund brought into Court.

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by the other two actions pending concurrently with this against the ship.

A reference to a commissioner is ordered to ascertain the balance of wages due to the libellants respectively, upon the principles before declared, with interest thereon from December 28, 1847; (unless the amount can be settled by agreement;) and on the coming in and confirmation of the report, a decree may be entered for the payment of the amounts reported due, out of the proceeds of the vessel in Court.

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Since the adoption of the Circuit Court Rules of 1845, Rule 96 of the District Court of 1838, refusing to a proctor in a suit fees as advocate, is abrogated, in respect to all fees other than those specifically introduced and appointed by the District Court; and fees for services as proctor and as advocate are taxable to the same person.

In what cases costs may be taxed for motions to postpone the hearing of a cause called in its order on the calendar.

Costs are not taxable for the preparation of written arguments, except upon a stipulation in writing, to that effect.

In what cases costs may be taxed upon motions to enlarge time to answer, upon motions for final decree, motions for costs, for a reference, &c.

THIS was a libel *in personam*, by Cyrus B. Manchester against George Milne, to recover freight upon a cargo of coal.

The cause was before the Court upon the merits in 1848, when a decree was rendered in favor of the libellant. The proceedings upon that hearing are reported, *ante*, 115.

The cause now came up upon appeal from a taxation of costs. The grounds of the appeal appear in the opinion.

BETTS, J. Both parties appeal from the taxation of costs made by the deputy clerk in this case; but the principal exceptions, in number and amount, are taken by the respondent.

Two legal points of general application are raised, which are of sufficient importance to demand a formal consideration, and the reasons assigned for this decision will have relation chiefly to those propositions.

The bill rendered and taxed embraces separate charges for advocate's and proctor's fees, the pleadings being signed by Messrs. Burr and Benedict as proctors, and by Mr. Beebe as advocate.

The respondent has put in his affidavit, stating that those three gentlemen are copartners in the practice of law in this city, and that, as is generally understood, they practice in copartnership in all the State and United States courts; and he objects to the charge of advocate's fees at all, contending that all the partners in effect act as proctors in the cause.

Mr. Beebe, by affidavit, states that the connection between himself and Messrs. Burr and Benedict, in the Admiralty business conducted in their office, is not a copartnership; that he acts as advocate solely, and takes to himself the taxable fees as advocate for his compensation, and has no share of or interest in the fees of the proctors, which belong exclusively to the other two gentlemen.

I do not, however, consider this fact, whichever way it may be, as varying essentially the question; because, in my opinion, the rule of allowance is definitely fixed by law in respect to the greater part of the items in contestation. The rules of the Circuit Court, adopted June 28, 1845, which also govern the practice and costs of this Court, change Rule 96 of this Court, and regulate the costs of parties, their attorneys, solicitors, and counsel, in private actions, conformably to the grant by the act of Congress of May 18, 1842, of costs to the United States attorneys within this State; and when services are rendered pursuant to the course of practice of this Court, for which no fees are specifically appointed under the act, the usages of this Court and the United States Supreme Court are to determine the rate of allowance.

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The provision in the act of Congress limits the fees receivable by the United States attorneys to the fees and compensation allowed by the laws of the State of New York, for like services, according to the nature of the proceedings.

These rules accordingly render the statute law of New York in relation to costs, in force May 18, 1842, the rule of taxation in this Court, when no specific fee is appointed by Congress. The State act of May 14, 1840, (§ 4,) provides, that when a fee is allowed to an attorney or counsellor, it shall be taxed only for one counsel or attorney, and the same person may be allowed fees both as attorney and counsel in the same cause.

It would accordingly make no difference if the advocate and proctors in this cause were in full partnership in every branch of their business, sharing in common all costs taxable in the cause; for it is plain that a fee appointed to a proctor for a service, and another to an advocate for the same service, would, under those provisions, be both taxable to the same person.

The act of Congress comprehends all classes of costs taxable in favor of district attorneys and clerks in this State; within whatever jurisdiction their services are rendered, and the rules of the Circuit Court have force in respect to private suitors, coextensively with the provisions of the statute relating to those official fees. In my opinion the provisions of the State law so adopted by Congress, must be held to supersede all regulations previously in force under the rules or practice of this Court or of the Circuit Court conflicting with the State law; and that the restriction in the tariff of costs, established by this Court in 1838, which denies to a proctor the allowance of the same fee taxed to him as advocate, is abrogated.

I accordingly hold that the objection to the taxation of advocate fees in the cause must be overruled.

The next objection of a general bearing is that taken to the

charges for attendance, for briefs and opposing motions, and for temporary delays asked for and allowed in term, in respect to the trial of the cause.

It seems that when the cause was called in its place on the calendar, excuses were offered on the part of the respondent, and a request was made that the hearing might be postponed to an after day, which was objected to at the time on the part of the libellant. No notice of motion was given, and no proofs were introduced which were the subject of discussion.

I think the party has no right to the fees charged for that proceeding. A formal motion or affidavit to put off a cause for the term stands on a different footing, and the party against whom it is made may rightfully ask to have its hearing deferred until he is prepared to meet it, and if he waives that right, and consents to debate or meet the motion *instantly*, there would be a reasonable color for allowing him the usual costs attached to the resistance of special motions made on notice given. It is otherwise in incidental, and, as it were, colloquial applications, where from some casualty a party asks that his case may be deferred to a particular day, or be temporarily passed on the calendar. All the costs which would naturally appertain to such arrangement of the business would be the expense of witnesses for the day, and perhaps, on a liberal construction of the fee-bill, the attendance fee of the advocate and proctor in Court for the time.

I shall allow charges for opposing motions made on notices given to put the cause off for the term, and disallow them in all cases where the application was without notice, and only to defer the hearing to another day in the same session.

No appointment of a fee in the State law, or under the practice of the United States courts, is shown for written arguments. They are furnished by mutual consent, and for the purpose of expediting the decision of a cause not likely to be heard orally. Neither party can therefore cast upon the other the expense of that mode of proceeding. If the counsel

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will not waive their right to taxable fees for arguing a cause, they must mutually stipulate in writing, that a written argument shall be regarded, in the taxation of costs, the same as an oral one in Court.

It is stated in the bill of costs, that the Judge ordered the cause to be submitted in writing. This is undoubtedly a misapprehension. Such direction is never given in our practice. If one party insists on an immediate hearing, and to avoid the delay asked by the other, offers to submit the case on written argument, the Court may refuse the delay asked except on condition of furnishing a written argument. This is only to preserve to the diligent and prepared party all his rights and the advantage of a prompt disposition of the case. But that in no way rests on the authority to prescribe to parties this particular method of debating the case. Those charges in this bill must be rejected.

Various items of charge are claimed for attending Court, and on motions made in writing, merely formal as for time, to the defendant to answer it, &c. This is mere chamber business. In some of the instances specified, the extension of time was assented to by the libellant, and no special attendance was necessary or required on his part. Where the continuance was allowed on return day of process, the libellant must, according to the due order of practice, be in attendance to receive that return, and is allowed a fee therefor, and he cannot duplicate that fee, because of another step then taken, entirely incidental to the return. So, also, it was needless for him to attend in Court at the day allowed the defendant to answer. He was entitled on return of process to a default *nisi*, and if the defendant failed to comply with the terms of his indulgence, the decree on that default would become final.

Merely suppositious motions cannot be charged, such as motion for final decree, motion for costs, motion for reference, &c., when the object of the supposed motions are embraced

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in the decretal order of the Court; though there may be foundation for similar charges when they are based upon specific application to the Court for the modification, reversal, or enlargement of the final decree as to any of those particulars.

The taxed bill must be rectified according to the directions here given.

THE REMNANTS OF THE CAITHNESHIRE.

Where a libel demanded the recovery of \$6.75, wages due to each of two libellants, and \$75 to each for salvage services, and the claim for wages was allowed, but that for salvage service was disallowed, and the decree was generally for the wages due, "with costs,"—*Held*, that plenary costs were taxable in favor of libellants.

The discretionary power of the Court over the award of costs cannot be exercised on an appeal from taxation, especially after the expiration of the term in which the decree is rendered.

THIS was a libel filed by James Drain and James Murphy, against the remnants and proceeds of the bark Caithneshire, *in rem*, and also *in personam*, against J. Rankin, her master, to recover for wages and for salvage services.

The libel demanded the recovery of \$6.75, wages due to each libellant, and also an additional compensation to each of \$75, for salvage services on board the vessel after the period to which wages were charged. This last claim was disallowed by the Court on the final hearing. The wages demanded were decreed the libellants with costs, and the term for which wages were to be computed was held to embrace the period the libellants remained with the vessel after she stranded.

The claim against the master personally was dismissed with costs. The amount recovered was less than \$50, but the bill of costs was made up by the libellants and taxed by the clerk, after the lapse of the term, as in a plenary suit.

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The claimant appealed from the taxation, insisting that costs of summary actions only could be allowed.

W. Muloch, for appellants.

Alanson Nash, for respondents.

BETTS, J. By Rule 165 of the District Court, causes wherein the *matter in demand* does not exceed \$50, are made summary, and by Rule 176, the advocate's and proctor's costs on each side are limited in such actions to \$12.

In these cases, as in those determining the jurisdiction of the Circuit or Supreme Court, the amount put in demand by the claim of the libellant is conclusive upon the point.

In this case the respondent and claimant may clearly appeal to the Circuit Court on the merits, because they have been compelled to litigate a demand exceeding \$50; and for the same reason the libellants may appeal, they having put in suit a claim beyond \$50, which this Court has refused to adjudge in their favor.

Accordingly, upon the face of those proceedings, the libellants, on a general decree for costs, are entitled to have them taxed as in a plenary cause. The same rule applies to the costs awarded the respondent in that branch of the case which seeks to charge him individually.

It was competent to the Court, on the hearing or during the term, to have regulated, at its discretion, the allowance of costs. Had the subject been brought to my attention, I am strongly persuaded I should have limited the recovery on each side to summary costs.

The final decree was pronounced and enrolled in January term, and it is doubtful whether the Court has any power over the subject after the expiration of that term. 3 *Sumn.* 495; 7 *Cranch*, 1. There is no authority in the Court to adjudge costs *de novo*, on an appeal from taxation; such order should be one made in the cause on the hearing, and composing in part the terms of the final decree.

The appeal from the taxation overruled.

The Alida.

THE ALIDA.

The libellant, a blacksmith, solicited the engineer of a domestic steamboat running daily between New York and Albany, to employ him in making such repairs as should be required during the season by the boat, in the line of his trade. The engineer promised this, and the libellant was called upon to make, and did make repairs upon the boat at various distinct times, sending in his bills monthly.

Held—1. That these facts did not constitute an employment for the season, but that the libellant had a right of action for each distinct job when it was completed.

2. That libellant's lien upon the boat, if any, under the provisions of 2 Revised Statutes, 405, § 2, for each item of service rendered by him, was discharged on the lapse of twelve days after the departure of the boat from Albany for New York next following the rendering of such service.¹

The Court affords a remedy against domestic vessels for labor, supplies, &c., furnished, only where the vessel is subject by the local law to a lien therefor; and the privilege is enforced subject to every qualification or limitation attached to it by that law.

THIS was a libel *in rem*, by James O. Haight against the steamboat Alida, to recover for repairs made upon that boat.

The facts out of which this action arose were as follows: During the navigation season of 1847, the steamboat Alida, being then wholly owned in this State, was employed in running between New York and Albany, making regular passenger trips daily, Sundays excepted. The libellant was a blacksmith, residing at Albany, and he solicited the engineer of the boat to employ him in doing such jobs of work as should be required in the line of libellant's trade during the season. The engineer promised to do so; and at various times when the boat was at Albany, from August 4 to September 24, the libellant was called upon to make repairs upon the engine

¹ On the subject of liens upon domestic steamboats, see, also, the decision in another suit against the Alida, reported *post*, immediately following that above.

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and other parts of the boat, and he supplied, during that time, all labor and materials within the scope of his trade which the boat required. These services were rendered by the libellant on the 4th, 6th, 13th, 18th, 20th, 22d, and 27th days of August, and on the 1st, 8th, 13th, 15th, 17th, 20th, 22d, and 24th days of September.

The Alida changed owners in New York, September 21st; her down trip from Albany was on the 25th, and no work was performed on her by libellant subsequently. She was attached, on her arrival in New York, on other demands, but afterwards continued her trips as before. The engineer who employed the libellant left the boat on the 27th.

There had accrued during the month of August, upon the libellant's account for services, charges amounting to \$80.95, and the bill therefor was presented on the 1st of September. On the 20th of September, \$50 was paid the libellant, and was credited on the August account. Early in October, the bill for the September work, including the arrears on the August bill, was presented to the owners in New York. The book-keeper of the libellant testified that it was his course of business to present the libellant's shop bills for payment on the first of each month.

The libel was filed on the 7th of October.

John Cochrane and S. P. Staples, for libellant.

Smith & Woodward, for the claimant.

BETTS, J. The present action was commenced within twelve days after the libellant ceased working on the boat; but if each job created a debt by itself due and payable when such job was completed, all the items, excepting the last one, \$13.43, had been due more than twelve days when the vessel was arrested, and more than that period would have elapsed after the work was finished, and after a departure of the vessel from the port of Albany to the port of New York.

To sustain the action upon the facts shown, the libellant

must maintain one of two propositions: that his employment was for the *season*, and that accordingly he had no right to arrest the boat until his contract was terminated by the expiration of the running season, or by the act of the owner of the boat; or that, in order to bar his remedy *in rem*, the boat must have left Albany and have remained absent for more than twelve days *continuously*, after each particular indebtedness accrued.

In my opinion, the evidence in no way authorizes the assumption that the hiring of the libellant was for the entire season. The nature of the employment clearly indicates that it was merely for piece or job work, and that, in each instance, the libellant had a right to demand payment when the particular job was completed. It was the usage of his shop, indeed, to render bills to customers monthly; but that usage in no way affected the legal right of libellant to withhold the indulgence and exact ready pay, nor did it put him under obligation to proceed, and supply material and labor on credit throughout the season. Such usage could only tend to raise a presumption in favor of such credit; but this presumption, if unsupported by other proofs, would be of too slight a character to postpone his right to collect his charges, because it would be balanced if not indeed countervailed by another implication, that each piece of work or article of manufacture furnished by a mechanic, completes his obligation to his employer as far as that item of employment is concerned, and has no connection with or dependence upon other services, similar in character, rendered between the parties. This is the well-understood relation of employer and employed, in all cases of mechanical services; and there is no stronger inference in favor of a continuing credit where the employment is for a series of independent repairs to a single steam-engine, than where it is for the original construction of several different engines. In the absence of stipulations between the parties, the law assumes that a mechanic is entitled to com-

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pensation for his job when finished, (*Story on Bailm.* §§ 425, 426,) and the job must, in ordinary acceptance, be regarded as finished when all the material or labor demanded has been fully supplied. This is as true in relation to small items of mechanical labor and supplies, as it is in respect to those of the greatest magnitude and expense. The job of the block-maker is to all legal intents completed when he has finished the particular tackle ordered, as clearly as is that of the shipwright when the ship is launched and fully sparred; and either is then entitled at law to demand compensation for his labor and materials.

If, then, the employment proved in this case were to be regarded as a contract for hire and materials, I should think it amounted to nothing more than an engagement by the libellant to answer such calls or orders as should be made upon him in his line of business, leaving his right to recover compensation therefor to stand upon the ordinary legal footing. In my judgment, however, the understanding between the libellant and the engineer constituted no agreement obligatory on either party. It was no more than the customary good-will solicited by tradesmen and mechanics, and promised by those to whom application is made. These friendly assurances secure no right to either party which can be enforced against the other, as arising upon an agreement of legal obligation.

The question then arises, under the second point, whether the lien, if originally existing in favor of the libellant, was discharged by the departure of the boat from Albany, twelve days or more before the suit was brought.

Where services or supplies are rendered to a foreign ship, a lien attaches by the general maritime law; and the different States of our Federal Union are, in regard to this question, regarded as foreign States to each other. The nature, extent and character of the lien, in such case, are to be determined, not by the local law of the particular State, but by the gen-

eral principles of the maritime law applicable to the case. *Zane v. The Brig President*, 4 *Wash. C. C. R.* 453; *The Nestor*, 1 *Sumn.* 73; *The Bark Chusan*, 2 *Story*, 455. But against domestic vessels the Court affords a remedy only where they are subject by the local law to a lien for work done, or for articles or materials furnished in building or repairing the vessel, or for provisions or stores furnished within the State, and fit and proper for the use of the vessel when furnished; and accordingly the privilege is enforced, subject to every qualification or limitation attached to it by the State law. The case is governed altogether by the municipal law of the State, and no lien is implied, unless it is recognized by that law. *The General Smith*, 4 *Wheat.* 438; *The Robert Fulton*, 1 *Paine*, 620; *The Jerusalem*, 2 *Gall.* 345; *The Hull of a New Brig*, 1 *Story*, 244; *The Bark Chusan*, 2 *Story*, 455; *Peyroux v. Howard*, 7 *Pet.* 324; *Harper v. The New Brig, Gilp.* 536; 14 *Conn. R.* 404; *Davis v. The New Brig, Gilp.* 428.

The statute of the State of New York, under which this lien must be supported, if at all, contains a provision that "when the ship or vessel shall depart from the port at which she was when the debt was contracted, to some other port within the State, every such debt shall cease to be a lien, at the expiration of twelve days after the day of such departure; and in all cases the lien shall cease immediately after the vessel shall have left this State. 2 *Rev. Stats.* 405, § 2.

The act preceding this, (*Laws of 1830*, c. 320, § 50,) and the antecedent one, (*Laws of 1817*, c. 60, § 1,) have always been held in this Court to bar the arrest of a vessel after twelve days subsequent to her leaving (provided her departure is not clandestine or fraudulent) the port in which the lien was incurred, and going to another port in this State, without regard to the time during which she might remain away from the port where the debt was contracted. *Jenkins v. The Steamboat Congress*, *MSS.* 1841; *The Steamboat Joseph*

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E. Coffee,¹ *MSS.* 1846. I am satisfied that the State act demands that exposition, and should now only refer to the former decisions in this Court upon the subject, had it not been earnestly contended in this case that the meaning of the provision was clearly different from that of the former acts upon the same subject, and that it requires, in order to discharge the lien, a continuous absence of the vessel for more than twelve days from the port where the debt was contracted, and that she remain for that length of time in some other port or ports within the State. It was urged that any other construction would render the lien fallacious and worthless, for the reason that the creditor could never know when it was intercepted or destroyed. Stress was also laid upon the decision of the Supreme Court of the State of New York, in *Dennison v. The Schooner Apollonia*, (20 *Johns.* 194,) as determining that the vessel must remain more than twelve days in the port to which she is removed, in order to divest the lien. And in view of this construction of the statute, it was further contended that the boat, having returned to the port of Albany on every day succeeding the one on which she left it, had never departed from that port within the intent of the statute.

I think there is but slight call for construction in this case, as the words of the statute (2 *Rev. Stats.* 405, § 2,) fix the meaning of the legislation with a clearness not to be strengthened by explanatory comments. The *day of departure* is the point from which the limitation commences running, and it becomes final at the expiration of *twelve days* after that day.

The reasons upon which the legislation on this subject rests, also demand this construction of the law, in so far as it applies to cases not constituting maritime liens to be enforced by Admiralty courts under their general jurisdiction. Those

¹ Since reported, *Olcott*, 401.

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courts take no cognizance of such claims against domestic vessels in their home ports, excepting in execution of the local law. It is accordingly the lien of the artisan or furnisher, as recognized at common law, that the legislature had in contemplation and sought to extend. *The Marion*, 1 *Story*, 68; *Moore v. Hitchcock*, 4 *Wend.* 292. See, also, *Harper v. The New Brig*, 5 *Gilp.* 536. The common-law lien was dependent upon the actual holding in possession of the thing to which it attached, and any surrender, however brief, of such possession, divested or discharged the lien. So, when actual possession of the thing was not acquired, the lien never attached. *Story on Bailm.* §§ 440, 588; *Exp. Foster*, 2 *Story*, 131; *Meary v. Head*, 1 *Mas.* 319. This rule of law manifestly left mechanics, material-men, and others who furnished stores to vessels while anchored in port or moored at the dock, yet remaining in possession of their owners, masters, and crew, without other security for their claims than the personal responsibility of their agents or owners. This mischief is remedied by a statutory liability, having all the virtue of a common law and maritime lien, not only while the vessel is under the hands of her creditors, but for twelve days after she departs from the port where the debts were contracted, to any other port within the State.

While there is an impressive equity in affording to creditors some means of protection against the sudden removal of vessels from under their hands, thus cutting off their security, it is plain that the legislature meant also to guard the public against prejudice from these tacit and secret claims. They are permitted, accordingly, to continue in existence for a short period after the vessel has gone from their *quasi* occupancy and possession. It is proper that sufficient time be allowed to enable the creditor to enforce his right; but no reason demands that these liens should be allowed to float with the vessel, going out of the port and coming back with her to it, so long as she may continue to revisit it, without her absence

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exceeding twelve days. On the contrary, this would tend to mislead and prejudice subsequent purchasers and creditors, as such prior lien, if sustained, would hold its preference against all subsequent claims, (*Rankin v. Scott*, 12 *Wheat.* 177,) and thus would be withdrawn all the protection which the limitation of time prescribed by the statute was designed to secure.

The Supreme Court of this State have evidently so understood the provisions of this act in *Hancocks v. Dunning*, 6 *Hill*, 494. They preserved the lien in that case only because the vessel had not left the port or State within the meaning of the act. She had only gone out on an experimental trip to try her boilers, and it was held that the touching at a New Jersey port, while on such an excursion, did not divert the lien. The language of the Court suggests that the present case would be regarded as coming within the limitation. The Court say: "The reasonable construction is, that the lien ceases when the vessel departs from the port where the repairs were made, or leaves the State, upon a voyage or trip *in the pursuit of some kind of trade or business.*" The boat in this case was running in steady employment as a passenger vessel, loading and unloading daily at the port of departure and destination, and completing her voyage on her arrival at the latter.

The case of *Dennison v. The Schooner Apollonia*, (20 *Johns.* 194,) relied upon on the argument, turned upon the language of the State act of 1817. *Laws of 1817*, 49, c. 60, § 1. This provision is not incorporated in the Revised Statutes, and it is exceedingly difficult to comprehend what is intended by it. There is probably a misprint in the *proviso*; but as the decision of the Court was upon a point of pleading, the only inquiry was whether the pleading had stated the case provided for by the act, and no attention seems to have been paid to the import and effect of the clause itself upon the rights and remedies of privileged creditors.

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The proviso was, "That the said lien shall in no case endure beyond twelve days after such ship or vessel shall leave the port *in which the same may have been arrested.*"

The plea in bar to the proceedings was, that the vessel left, and for more than twelve days continued absent from the port where the supplies, &c., were furnished before her arrest. The Court held the plea bad, because it did not state the cause which exonerated the vessel from the lien ;—that is, her *arrest*, before her removal, and then her continuing absent more than twelve days *after the arrest*. No principle is settled by that case which is applicable to this.

I am, accordingly, of opinion, that any indebtedness to the libellant, which was a lien upon the boat, ceased to be so after the expiration of twelve days from her leaving Albany, and subsequent to the time the debt was due.

The last charge made against the boat by the libellant, September 24, being for less than \$50, no lien arises in his favor for it, and upon the considerations stated, he cannot maintain the suit for the antecedent credit.

Libel dismissed with costs.

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Where a writing, although embodying an agreement, is manifestly incomplete, and not intended by the parties to exhibit the whole agreement, but only to define some of its terms, the writing is conclusive as far as it goes ; but such parts of the actual contract as are not embraced within its scope, may be established by parol evidence.

The owner of a steamboat, and a corporation engaged in the business of supplying coal to steamboats, had for some months been accustomed to deal with each other for the supply of coal required by the boat ; the requisite supply for her wants upon each trip being furnished her on each arrival. Under these circumstances the owner executed a written memorandum, acknowledging that he had purchased 1500 tons of coal at a specified price per ton ; which was, however, silent as to time and mode of delivery and payment.

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Held,—1. That the previous course of dealing between the parties might be shown, to establish their intention in regard to these points.

2. That upon this evidence the contract must be construed as intending a delivery of the coal from time to time as it might be ordered to meet the wants of the boat, and as creating an obligation to pay for each parcel of coal as delivered.

A steamboat is subject to a lien under 2 Revised Statutes, 493, for fuel furnished her for the purposes of her navigation.

The lien for labor, supplies, &c., furnished to vessels, given by 2 Revised Statutes, 493, takes effect from the time when the benefit is actually conferred, not from the date when it is engaged or contracted for.

This was a libel *in rem*, by the President, Managers, and Company of the Delaware and Hudson Canal Company, against the steamboat Alida, to recover for supplies of coal furnished that boat.

The action arose out of the following facts:—The libellants' corporation were the owners of the Lackawanna coal beds, and were engaged in supplying coal extensively to steamboats. Their course of business was, to deliver the coal in carts from the yards of the company as it was required for use, and to render bills therefor regularly about once a month, to those receiving the supplies, and to collect the amounts within a few days afterwards, allowing a reasonable time for the examination of the bills.

The Alida was built during the winter and spring of 1847, and was employed during the navigation season of that year, in running between New York and Albany as a passenger boat. She was accustomed to leave New York on Mondays, Wednesdays, and Fridays of each week, returning the alternate days; and she usually, on her arrival down, received coal sufficient to supply her run up the next day. The libellants were accustomed to supply her with coal; and it was proved by the books of the libellants, which were put in evidence by the claimants, that the libellants supplied the boat, in this city, on March 19, 1847, with four tons of lump coal, at \$5.50 per ton; on April 10th, with ten tons at the same price; and on alternate days during the residue of the same

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month, with 141 tons, generally furnishing a little more than twenty tons per day, at \$5 per ton. In like manner the boat received in May, 245 tons in New York; eight tons at Kingston, at \$4.50; and at Rondout 349 tons, at \$4; the latter quantity being delivered together. In the same manner she received, in New York, during the month of June, 303 tons, at \$4.50 per ton; and in July, up to and including the 10th, 123 tons, at the same price. The total price of these supplies was \$4,557.70. Payments were made on June 23d, of \$782, and June 30th, of \$2,858.70, leaving a balance which remained due up to July 12th, of \$917. On the last-mentioned day, William R. McCullough, of New York city, then the owner of the boat, made an engagement with the libellants' corporation for further supplies of coal. The only direct agreement proved was a memorandum in the following words, written by McCullough, in the books of the libellants:—

Steamboat Alida. I have purchased this day of the Delaware and Hudson Canal Company, five hundred tons of lump coal, to be delivered at Rondout, at \$4.62½ per gross ton, less 12½ cents per ton for cash, to August 1st. Also, one thousand tons of lump coal, to be delivered from yards in New York, at \$5 per net ton, to be delivered by carts.

WM. R. McCULLOUGH.

New York, July 12, 1847.

From this time the delivery of the coal continued in the manner practised theretofore. On each arrival of the boat in New York she received almost uniformly twenty-four tons at a time; the smallest quantity being once twenty tons, and the largest twenty-five tons three times. On August 2d, the sum of \$1,363.50 was collected by the libellants, and on August 31st, \$2,145. The collecting agent of the libellants was accustomed to present the bills to McCullough, throughout the season, for each month's delivery of coal, and he also

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used to call a few days after the presentation of the bills, when he received the payments as credited. When he presented the bill for September, McCullough promised to pay the amount due in a day or two.

On Monday, September 20th, McCullough transferred the boat to another person in trust; but the custom-house officers refusing to register that conveyance, a regular bill of sale to E. Stevenson, was executed on the 21st, and on the 27th, Stevenson conveyed her to Orvin Thompson. The failure of Stevenson was publicly known in the city on the 21st of September. It was on that day, also, that the vessel was attached on the libel filed in this cause.

The action was now before the Court for hearing on the pleadings and proofs, and was heard at the same time with the action by James O. Haight against the same boat, a report of which case immediately precedes this.

William H. DeForest and S. P. Staples, for libellants.

Smith & Woodward and Mr. Crist, for claimants.

BETTS, J. I am of opinion that the evidence offered of the course of dealing between the parties during the early part of the season is proper and relevant, to show the relation in which the parties stood to each other, and the character of their mutual dealing, and that it affords a safe guide to the intention and meaning of the written memorandum of July 12th. That agreement, as reduced to writing, most manifestly does not represent the entire bargain and understanding between the parties. It is not to be supposed that either of them contemplated an instant sale of fifteen hundred tons of coal, which the libellants could at once deliver and compel payment, or require payment in advance, or which McCullough had a right to demand, *in toto*, on the signature of the paper, or on any day he might designate. The obvious purpose of the parties was to arrange the prices which should be paid for the coal, and to fix the quantity which should be

supplied at those prices, and accordingly a mere note or memorandum was made of those particulars, leaving the mode of supply, in respect to time, amount, &c., to continue as theretofore. A stipulation between vendor and vendee, circumstanced as these parties were, if intended to contain the whole contract, would naturally, if not necessarily, define with precision the rights and obligations of each under it, specifying the periods and quantities of delivery, and the terms of payment. The parties to this agreement had been, at its date, engaged in dealing together for more than three months, in the very matter to which the agreement related, and they both perfectly understood the general usage of that branch of trade, and their own respective means and wants. The libellants knew that McCullough was running a day boat on the river, which consumed more than twenty tons of coal on each trip; and McCullough well knew that they had command of the fuel usually required and obtained for the use of steamboats, and there was an established usage between them to furnish and receive a daily supply at the current market prices, payable on delivery. Both were willing to make an arrangement which should relieve this trade between them from the uncertainty of price to which coal is subject in the general market, and which the proofs show had occurred within the previous three months, to the advantage and disadvantage of each, compared with the standard adopted in the agreement. Thus the circumstances under which the agreement was made have a most important bearing in determining the actual intention of the parties, if the Court is not required, in determining that construction, to lay out of view every thing extraneous to the writing itself.


It is very clear, upon the authorities, that this agreement, being manifestly incomplete and intended to define not the entire contract but only one or two of its terms, the circumstances of the case, and especially the previous course of dealing between the parties may be resorted to, in order to supply

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those parts of the contract which are not within the scope of the memorandum, as well as in determining the sense of uncertain or ambiguous words. Had this writing been a formal obligation under seal, the circumstances in proof might rightfully be noticed in ascertaining the meaning of the parties; and a mere parol memorandum, not amounting to a complete agreement, can incontestably be construed with reference to extraneous facts which tend to determine the motives and intentions governing its adoption. Thus it is said that the rule which forbids the admission of parol evidence to contradict or vary the terms of a written instrument, is directed only against the admission of any other evidence of the *language* employed by the parties making the contract than that which is furnished by the writing itself. But the writing may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties. 1 *Greenl. Ev.* §§ 275, 277, 287, 288; *Chitty on Contr.* 24, 25; 7 *Metc.* 583.

The Supreme Court of this State, in 1815, in *McMillen v. Vanderlip*, (12 *Johns. R.* 165,) held that the rule governing the construction of contracts ought to be discharged of all subtlety, and that they should be expounded according to the real intention of the parties. So, in South Carolina, it is distinctly held that loose memoranda, not containing a complete agreement, are open to explanation by parol proof. *Stone v. Wilson*, 3 *Brev.* 288. So, in Missouri, the Court holds the rule to be that parol evidence is admissible to show the time, place, and manner of performing a written contract which is silent upon those subjects. *Benson v. Peebles*, 5 *Mo. R.* 132. So, also, the Supreme Court of New York, in *The Farmers' and Manufacturers' Bank*, (23 *Wend.* 419,) admitted parol evidence where the agreement was in writing, to show the nature of the transaction, and the object and purpose of the parties.

The case of *Potter v. Hopkins*, (25 *Wend.* 417,) decided in the New York Supreme Court, in 1841, is a clear authority



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upon this point. In that case, the contract between the parties was originally in parol, but was in part expressed in a receipt given for the first payment made under the agreement. The receipt being put in evidence on the trial, an objection was taken, that the party could not be allowed to prove the previous parol agreement, because such proof amounted to the contradiction of the writing; but the Court held that the instrument in question did not purport, on its face, to be a complete arrangement between the parties, but was obviously given as an acknowledgment of part execution of a contract, referring to some of its terms. It was held that the instrument was binding as far as it went, but that, as to such parts of the contract as were not embraced within the writing, parol evidence was admissible. There are many other cases which sustain this doctrine. See *Hunt v. Adams*, 6 *Mass. R.* 519; *Barker v. Prentice*, *Ib.* 434; *McCullogh v. Girard*, 4 *Wash. C. C. R.* 292; *Mead v. Steger*, 5 *Port.* 505; *Commissioners v. McCalmont*, 3 *Penn. R.* 492; *Sharp v. Lipsey*, 2 *Bail.* 113; *Knapp v. Harnen*, 1 *Gale*, 47; *Reay v. Richardson*, 2 *Crompt. M. & R.* 427; *Ingram v. Lee*, 2 *Campb.* 521; *Hall v. Mott, Brayt.* 81; *Tisdale v. Harris*, 23 *Pick.* 12.

The case of *Jeffrey v. Walton*, (1 *Stark.* 167,) is perhaps more analogous to that now before the Court than either of those yet mentioned. That case was *assumpsit* for damages received by a horse hired by the defendant from the plaintiff. At the time of the hiring the plaintiff told the defendant's agent, who applied for the horse, that if he took him on hire he must be liable for all accidents. The agent engaged the horse on this condition, and the following memorandum of the terms was made in writing:—

“Six weeks, at two guineas.

“WILLIAM WALTON, Jun.”

The counsel for the defendant contended on the trial, that

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this memorandum was to be considered as the real contract between the parties, having been made according to the evidence immediately upon the close of the agreement, and that it was not competent to the plaintiff to engraft upon it a further term by means of parol evidence. And, consequently, that this was nothing more than an ordinary case of hiring, in which accidents of this nature were to be borne by the person who let the horse. But Lord Ellenborough said: "The written agreement merely regulates the time of hiring and the rate of payment, and I shall not allow any evidence to be given by the plaintiff in contradiction of these terms; but I am of opinion that it is competent to the plaintiff to give in evidence suppletory matter as a part of the agreement."

In my judgment, therefore, this memorandum, if read in view of the proofs in the case, did not in any way vary the relation of the parties in their dealings in the matter, excepting in respect to the prices chargeable for the coal. The libellants were bound under it to deliver the coal as before, from time to time when it might be demanded, and only in the quantities required at each time; and McCullough was bound to pay for each parcel of coal on delivery. Each delivery created a debt to the value of the coal delivered, and that debt was payable immediately. The acts of the parties after the agreement are, moreover, fully in accordance with this exposition of their meaning, derived from their previous usage. Coal was supplied to the boat at each trip, and only enough to meet her consumption on the run. The bills were rendered as they previously had been, and collections were made upon them as being then due and payable. It is plain that McCullough so understood the rights of libellants and his own obligations, because he promised their collector, in September, to make immediate payment of the balance in arrear.

It appears to me, also, that the words themselves of the memorandum may reasonably be considered to coincide with

this interpretation, collected from the course of dealing between the parties, and that they by no means import a contract of sale of fifteen hundred tons of coal as an entirety.

Five hundred tons are deliverable at Rondout, at \$4.62 $\frac{1}{2}$ per ton, less 12 $\frac{1}{2}$ cents per ton for cash, to the 1st of August. This latter provision fairly implies an understanding that a part only of the stipulated quantity might probably be called for before August. It seems to me the meaning to be attached to the clause, construing the memorandum by itself alone, is that whatever part of the five hundred tons McCullough chose to take from Rondout, between July 12th and August 1st, he should receive at \$4.50 per ton, paying cash on delivery, while that taken afterward should be at \$4.62 $\frac{1}{2}$ per ton; and that, consequently, it was at his option to order the whole or none on the lower terms. There is no indication in the memorandum that it was the duty of the libellants to make immediate delivery, or that they had a right to deliver the whole five hundred tons at their election immediately after the signature of the agreement.

The one thousand tons contracted for in New York were to be delivered from the *yards* and in *carts*. This manifestly contemplates a delivery in parcels, and at distinct times. If lump coal from yards is an article different from and superior to coal brought to market in barges and in bulk, and the contract can only be satisfied by supplying coal of that description, there could still be no reason for defining the method for transportation other than this, that the understanding between the parties contemplated the furnishing the coal in small lots when called for, according to the known usage of the trade, and the particular wants of the libellants.

I should have no difficulty, accordingly, in holding the agreement, even as evidenced by the memorandum itself, to be that the libellants should furnish the stipulated quantity of coal as it might be ordered by McCullough, and that they were entitled to payment upon each order as it was fulfilled.

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The cases cited to show that this contract must be construed as an entire one, under which the libellants had no right to demand any payment from McCullough, without showing either full performance on their part or a legal excuse for non-performance, do not, in my opinion, exclude the construction which I have placed upon the memorandum. In *McMillen v. Vanderlip*, already cited, (12 *Johns.* 165,) the plaintiff had hired for ten and a half months, under an agreement to receive wages upon a certain mode of computation, based upon the amount of work done by him ; and he left his employer before the completion of the term agreed for. The Court held that the engagement of the plaintiff to work out the whole period was a condition precedent, necessary to be performed before the defendant could be held liable for his wages. The principle of that decision does not, however, reach this case, for here is no agreement to deliver the whole fifteen hundred tons of coal before the price is payable. The analogy would have been a strong one had the stipulation been to deliver the fifteen hundred tons at or within a certain time, and for a specified amount of money, in gross or per ton. The case of *Champlin v. Rowley*, (18 *Wend.* 187,) was an analogous case to *McMillen v. Vanderlip*, and the decision there was only that an agreement to deliver a particular amount of hay, at a given time, must be performed entirely, or that no liability upon it accrued to the vendor against the purchaser.

The case of *Waddington v. Oliver*, (5 *Bos. & P.* 61,) was a case of like description. The agreement there was to deliver a hundred bags of hops before the first of January. A part were delivered in December, and immediate payment for them was demanded, and on refusal to pay, suit was brought for their value forthwith. It was held that the action would not lie for two reasons : first, because the plaintiff had not performed the whole of his contract ; and second, because the time in which the contract was to be completed on both sides, had not arrived when the suit was commenced. The Su-

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preme Court of this State held, in *McMillen v. Vanderlip*, that the first reason is a legal and satisfactory one. It is manifest, however, that the agreement in that case stipulated for a complete execution upon the part of the plaintiff by a given day, and accordingly gave an element of entirety to the contract which is not found in the one now before the Court.¹

The contract in the present case is destitute of that ingredient. There is no time stipulated at or within which the coal must be delivered, either at the beginning or close of the season, or within one or several seasons. That circumstance, it seems to me, is significant to show that the parties never contemplated a purchase or sale of fifteen hundred tons of coal as an entirety. That would have placed the purchaser who required a daily supply of fuel sufficient for his boat, quite at the discretion of the vendors, who would be in no way bound to furnish it with reference to the wants of the boat, but might follow their own convenience. And, accordingly, to uphold and carry into effect the plain meaning of both parties, the memorandum must be regarded as fixing only that term of the contract which was loose and indefinite before, namely, the price to be paid; and all else must be regarded as intended to be left upon its former footing. If the memorandum imports an entire agreement, then the libellants could rightfully perform the whole at once, (except, perhaps, delivering the five hundred tons at Rondout,) and as no time was fixed for the delivery, they might have elected to make it after the navigation of the river had closed for the season, and indeed without any reference to the wants of the boat during the season. No Court would close its eyes to the manifest purpose of the parties in the agreement, and to all the con-

¹ The cases upon the general subject of the dependence or independence of contracts, may be found examined in the note of Sergeant Williams to *Peters v. Opie*, (3 *Wms. Saund.* 352, n. 3,) and in the note of Mr. Wendell to the case of *Champlin v. Rowley*, (18 *Wend.* 194.)

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comitant facts tending to establish that purpose, so as to sustain a mode of execution which might wholly subvert its object, and the motives of the parties making it. If, then, under the general phraseology of the memorandum, there is to be implied, in behalf of McCullough, a right only to the delivery of coal when ordered; because that construction only is consonant with the relations of the parties and the plain object of the bargain, though not expressed upon its face, the like reason exacts in behalf of the libellants that the implication should be raised to protect them, in parting with so large an amount of property, from being compelled to rely solely on the personal credit of the purchaser—an obligation not assumed by them in the agreement, and which had never attended similar transactions between the parties.

These views in relation to the memorandum rest upon the assumption that it is to be regarded a contract on the part of McCullough, and as thus creating, by implication, corresponding engagements on the part of the libellants, so as to have the same effect as if it expressed a stipulation by them to deliver to him five hundred tons of coal at Rondout, and one thousand tons at their yards in New York.

But the circumstance should not be overlooked, that the memorandum may reasonably be understood as no more than an admission on the part of McCullough, that he had purchased such a quantity of coal at the prices stipulated; and as not meant to fix the terms of his contract beyond that, much less to regulate the manner of performance on the part of the vendors. He takes no assurance or engagement from them. There is not the mutuality essential to a contract to render it obligatory to both parties. *Chitty on Contr.* 3, 108. And this admission of purchase by him, not asserting any condition of credit or entire fulfilment of the sale by the vendors, would place him on the footing of an ordinary purchaser, who is bound to pay for the article bought on its delivery. *Com. on Contr.* 182. So he understood his own obligation,

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and both parties having throughout acted upon that, as the true meaning and design of their arrangement, and it being no way inconsistent with what is stated in the memorandum, I hold that the libellants were entitled to demand payment on each delivery of the several lots or quantities of coal ordered by McCullough.

A steamboat is subject to a lien under the State statute for fuel furnished her for the purposes of her navigation. 2 *Rev. Stats.* 493, § 1. In the case of *Johnson v. The Steamboat Sandusky*, (5 *Wend.* 510,) which was decided in the New York Supreme Court, in October, 1830, it was held that a party who had furnished wood to a steamboat, to be used as fuel for the purpose of propelling her, was not entitled to a lien therefor. The supplies contemplated by the act, it was said, "must be such as enter into the construction or equipment of the vessel and become part of her, and not such articles as are daily consumed and constantly replaced. They must be such as go towards the *building, repairing, fitting, furnishing and equipping* a vessel." That case was decided under the act of 1817. In the case of *Crooke v. Slack*, (20 *Wend.* 177,) the same Court held that the word "*stores*" introduced into the Revised Statutes on the subject, embraced fuel furnished to a steamboat as a particular now entitled to a lien. This Court, in the case of the *Steamboat Fanny*, (decided in February Term, 1841,) followed the construction of the statute given by the State Court in the case of the *Sandusky*, although not satisfied with that exposition. I now readily conform to the later interpretation of the statute by the local Court, without inquiring whether there is any essential difference in the provisions of the two statutes.

The lien, however, upon the principles laid down in the case of *Haight v. The Alida*,¹ heard at the same term with

¹ Reported *ante*, 165.

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this cause, is available to the libellants to the extent of such amount of coal only as was delivered to McCullough within twelve days before this suit was brought and after the departure of the boat on her regular trip to New York. This would include the coal delivered from September 9th to the commencement of the action, being one hundred and twenty tons, at five dollars per ton, amounting to \$600. For the residue of the quantity delivered the libellants have lost their remedy against the boat.

It is contended for the claimants, that any lien which might have existed for the balance of \$600 is discharged; because, by the act, it arises at the time the debt is contracted, and within the purport of the statute the debt was contracted on the 12th of July, after which day the boat continued to depart from New York for the port of Albany every alternate day, until September 21st, following, and a period exceeding twelve days after every such departure had elapsed before the institution of this suit.

It is manifest that the provision of the statute has relation to subsisting debts due and payable for supplies, materials, and labor furnished vessels, and not to initiatory and executory bargains out of which a debt may arise. A different construction of the statute would subvert the whole purpose and policy of the privilege, which is intended to give security for labor and materials actually furnished to vessels, and not to the mere contract or stipulation to supply them. These contracts are, probably, in most instances, entered into in anticipation of the time when the vessel is to receive the repairs or supplies, and she often continues her business, leaving the port where the contract is made and returning again, until the period arrives for its fulfilment. The anchors, spars, rigging, cables, sails, &c., which she requires, must often be in course of preparation by the furnishers, under their contracts, for considerable periods of time, during which she awaits their completion or pursues her employment. After

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she has received supplies, under such circumstances, to hold her discharged from liability on the ground that more than twelve days had elapsed after her departure from the port since the contract was entered into, would render the assurance held out by the act to creditors a sheer delusion. I cannot perceive the slightest color for such interpretation of its enactments.¹

The cases cited upon the argument in support of that construction, (*Moss v. Oakley*, 2 *Hill*, 265; *Moss v. McCullough*, 5 *Ib.* 131,) relate to subjects widely different and distinct in principle from this class of liens or charges, and have very slight, if any, analogy to the point in controversy here. They apply to the obligation of a stockholder in an incorporated company to pay the debts of the company, contracted whilst he is a corporator, and only touch this case in so far as the inquiry when a contract is considered in law to be made and obligatory. The act of incorporation in those cases made every stockholder liable for debts incurred by the corporate body while he was a stockholder. Those cases were claimed to fall within the purview of the statute; and in each the Court decided that the debts sued for had been contracted by the corporation within the period the defendants were stockholders. The first case turned upon a question of pleading, —whether it was necessary to aver that suit had been brought while the defendant *remained* a stockholder, and the other upon the effect of a judgment obtained against the company, as evidence to charge an individual stockholder with the debt. The principle involved in that statute, as expounded by the Court was, that the stockholder was surety for all debts of

¹ The same view was taken by the New York Court of Appeals, in *Veltman v. Thompson*, (3 *Comst.* 438.) It was held, on the authority of the decision in our text, (which was cited in *MSS.*) that “The statute has relation to a subsisting debt for supplies, materials or labor furnished vessels, and not to the initiatory bargain out of which the debt may arise.”

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the company, and that of course his liability would attach concurrently with that of the company at the time the debt was contracted. But neither case turns upon the point, or even adverts to it, whether conditional contracts, before fulfilment of the condition on the part of the creditor, come within the privilege. That question could hardly become a practical one under that statute.

It has been already sufficiently shown that no debt subsisted against McCullough on his undertaking until the libellants had delivered coal to him; the liability of the boat is incident and consequent only to the debt when it has been thus created and perfected. This was so in this case, on September 21, 1847, for the value of the quantity delivered that day.

Decree for the libellants for \$600, and interest from that day, and costs to be taxed.

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A shipper of a cargo of grain who takes no bill of lading from the carrier, is bound, in an action brought to recover for short delivery, to prove the amount delivered by him to the carrier to be transported.

A variance between the amount of a cargo of grain as stated in the measurer's bill in lading it on board, and the amount of such cargo as ascertained on delivery at the port of consignment, may be explained by showing that the mode of ascertaining the quantity is such that similar variations are necessarily of frequent occurrence.¹

THIS was a libel *in personam*, by Still Manning against Norman C. Hoover, owner of the sloop Cornet, to recover damages for non-performance of a contract of affreightment.

¹ Compare the case of *Manchester v. Milne*, *ante*, 158.

It appeared, in this case, that the libellant was the owner of 1857 bushels of corn, and 76 bushels of wheat, stored at the city of Brooklyn. The defendant contracted to carry the grain in his sloop to the city of New York, at a specified price per bushel. He received the corn on board his vessel, and was paid freight for the whole quantity; but the quantity actually delivered by him at New York, as there measured by weight, was only 1759 bushels, 24 lbs., thus leaving a deficiency of 97 bushels; to recover for which this action was brought.

The defence was, that under the circumstances of the case, the loss was to be attributed, not to any default on the part of the vessel, but to inaccuracy of measurement, and to waste necessarily incidental to the lading and unlading of such a cargo. The evidence upon this point is fully stated in the opinion.

D. McMahon, Jr., for libellant.

I. It is unnecessary for the libellant to show negligence on the part of the carrier. It is sufficient to show the shipment of a certain quantity, and it is for the carrier to show either a complete delivery or an excuse by *vis major*. He is liable for all thefts, robberies, and embezzlements by any of the crew, or by any other person, although he may have exercised every possible vigilance to prevent the loss; (*Story on Bailm.* 528;) and the mere fact that the owner or his servants go with the goods, if the other circumstances of the case do not exclude the custody of the carrier, will not of itself exempt him from responsibility. *Story on Bailm.* 533.

II. The master and owners of a ship are responsible for the goods which they have undertaken to carry, if stolen or embezzled by the crew, or any other person, though no fault or negligence may be imputable to them. *Schieffelin v. Harvey*, 6 *Johns.* 170.

III. The master and owners of vessels who undertake to carry goods for hire are liable as common carriers, whether

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the transportation be from port to port within the State, or beyond sea, at home or abroad; and they are answerable as well by the marine law as the common law, for all loss not arising from inevitable accident, or such as could not be foreseen or prevented. *Elliott v. Russell*, 10 *Johns.* 1; *Kemp v. Coughtry*, 11 *Ib.* 107; *McArthur v. Sears*, 21 *Wend.* 190.

IV. Where the goods are embezzled or lost during the voyage, the master is bound to answer for the value of the goods missing, according to the clear net value of goods of like kind and quantity at the port of delivery. *Watkinson v. Laugh-ton*, 8 *Johns.* 213.

V. If freight be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it may be recovered back. *Watson v. Duykinck*, 3 *Johns.* 355.

VI. In an action for the non-delivery of goods, pursuant to a contract of affreightment, the measure of damages is the value of the goods at the port of destination, but without interest, unless there has been fraud or misconduct on the part of the defendant. *Amory v. McGregor*, 15 *Johns.* 24, 38.

BETTS, J. Assuming the subject-matter of this action to be within the cognizance of this Court, the question upon the merits is whether the respondent is chargeable for the quantity of grain represented in the bill of measurement to have been delivered on board his vessel for transportation.

The evidence shows that the respondent had no agency in measuring or weighing the grain when put on board, or at its unlading and delivery. The libellant employed his own agents to transact that business at each end of the voyage. The owners of the store where the grain was on storage would not permit the measurer employed by the libellant to make the weight or measure of the corn; their clerk measured it and kept his own tally, and by his certificate or return of weight and measure it appeared that there was put on

board the lighter the quantity in bushels claimed by the libellant.

The statute of this State fixes the legal capacity of the bushel by measurement, (1 *Rev. Stats.* 2d ed. 621, § 19,) and the weight of corn which shall constitute a bushel at fifty-six pounds. *Ib.* § 40. The contract for the carriage of this cargo was by the bushel. No bill of lading appears to have been executed, but the certificate or account rendered by the warehouseman of the quantity of corn delivered to the vessel was accepted and acted upon as accurate by the parties, in paying and receiving the freight for its transportation.

The method commonly pursued in this port by dealers in grain for ascertaining the quantity, (and which was adopted substantially in this case,) is to measure it in a half-bushel by tale, tallying at each count of five measures, and to weigh one measure out of ten tallies, or one bushel out of every hundred measured, or other assumed proportion. The multiplication of the sum of the tales by fifty-six is assumed to show the quantity of bushels contained in the mass. The warehouseman refused in this case to permit the corn to be measured and weighed by any person except his own weighers. The libellant employed a measurer of grain to attend for him at the warehouse where this grain was stored and see to its delivery. He was present, and overlooked the tallies of the measures and weights as they were taken from the measurers and entered by the clerk of the warehouse, during the delivery of four or five hundred bushels, and saw that they were correctly stated by him. The residue of the delivery was made by the warehouseman alone.

The cargo was also unladen at New York, from the lighter, under the superintendence of the libellant's agents only.

It is fully proved that this compound method of measurement never works out a perfect concurrence in the two results. There is invariably a difference between the quantity given by the tales of measurement and the product in weight so

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obtained, at times amounting to an important per centage, but more usually not exceeding about five per cent. The evidence discloses several cases of that difference. The grain is shovelled into the measure by laborers, and then a measurer strikes or evens the measure. When the grain is thrown in heavily by the shoveller, or is shaken strongly or evened loosely by the measurer in striking, the weight of the full measure will be augmented, as will the measured dimension of the mass be diminished, and consequently, the tale line of the return will be reduced, as it may be unduly increased by an opposite irregularity in filling the measure. A difference of but one pound weight to a bushel, by either mode of manipulation, would create a variance in the computation of 1800 bushels, charged as delivered, of over thirty bushels in actual quantity, not participated in mutually by vendor and vendee, but operating exclusively to the advantage of one alone. These differences are usually made to harmonize by pound allowances or estimates, and that method may be fair enough where both parties have been present at the weighing and measuring; but it is governed by no rules or data capable of securing certainty, so as to constitute it a safe law to be enforced against a stranger to the process.

The enumeration of bushels in this case was obtained by compounding the hand-measure in half bushels of the whole bulk, with the weight of the several individual measures, and the sum in pounds, so produced, determined the quantity of bushels in the cargo. This method of determining the quantity was acted upon by both parties in fixing the amount of freight, but is not conclusive between them on the question whether the lighterman delivered to the shipper the whole quantity of grain received on board the vessel; for not only the circumstances stated necessarily lead to uncertainty and variations as to quantity in every measurement made, but moreover, a cargo loaded and discharged in the manner adopted in this case is subject to other causes of wastage and diminution.

After being weighed in the loft of the store, it was, on a windy day, run down to the hold of the sloop in an open pipe or trough exposed to the air. The evidence proves that by thus fanning out the chaff and light matter, a considerable diminution of bulk necessarily ensues, and by reason of this, and of the waste in shovelling and measuring adverted to, there would almost unavoidably be found on delivery a difference between the amount returned as taken on board and the one discharged, even when the same mode of ascertaining the quantity is employed in both instances, and that difference is augmented if the measure alone is used in one case and weight in the other. Some of the witnesses attempted to make out average computations of loss or gain on these heads; but it is obvious that estimates so formed can afford no satisfactory exactness in a given instance; it must be purely matter of conjecture whether under or over five per cent. would be lost.

The respondent proved, by the two men in charge of his vessel, that one of them remained constantly on board the vessel while the grain was there, and that none of it was removed by them or with their knowledge, except by the libellant's agents; and they testify that they do not believe it would have been possible for any to have been taken out of the vessel without their knowledge.

Conceding to the libellant the case in the strongest form in which he places it, that the respondent, as *lighterer*, stood in the character and assumed the liability of a common carrier, and was responsible for the whole quantity of grain put in his charge, the position must be taken also with the qualification, that he must prove the quantity placed on board, and that less than that quantity was delivered out to him. Both the acts of lading and unlading were his own, to the exclusion of the respondent, and he must prove, beyond reasonable question, that he did not receive from the defendant all the grain delivered on board of his vessel. The evidence on his

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part may be *prima facie* sufficient to lay a foundation for the presumption that such is the fact, and that the deficiency arose either from loss in the transportation of the cargo, or from its embezzlement by those in charge of the vessel, or from its unlawful abstraction by others. For losses of that character the respondent would be liable.

The testimony, however, which has been produced by the respondent, removes all the essential grounds for either presumption, and places the case upon the question of the accuracy of the measurement in lading and unlading the cargo.

The case then stands thus :—On the supposed quantity of 1857 bushels of corn, charged against the respondent, the defendant has sustained a loss of about 97 bushels, or over five per cent. of deficiency. The measurer employed by the libellant supposes that ordinarily in loading grain by weight, and delivering it by measure, the difference in quantity found would be very slight, and if there were any, it would be ordinarily rather in favor of the carrier. The excess, he thinks, would be about five bushels to the thousand. But he says that shovelling by hand, for the purpose of measurement, will sometimes make a difference against the carrier of about four ounces to the bushel, which a little exceeds five per cent. In this case he found a difference, on delivery, of five bushels, between weight and measure. Another witness, a weigher and measurer by occupation, supposes that 1800 or 1900 bushels of corn, shipped by weight, would usually deliver a less amount by 30 bushels, the quantity being determined in the same manner. If the grain is loaded in a high wind, the blowing out of chaff, he thinks, would lessen the measure considerably. He has never found the same quantity on re-measurement as on the first trial; there would always be some excess or deficiency. As a general rule, he should expect that one thousand bushels loaded by weight would deliver twelve bushels more by measure. According to his experience, the mode of shovelling may easily make a differ-

ence of one pound or more to the bushel. A third witness, Mr. Verplanck, proves that the amount put on board was determined by weighing it in lots of twenty-five bushels each. It was weighed by his clerk, without his personal superintendence.

It also appears that freight was charged and paid, according to the statement of the quantity made by the weigher.

I think that upon all the proofs, the inference is just as direct and satisfactory that less than the named amount of corn was laden on board the vessel, as that the defendant delivered less than he actually received. In order to charge him with a supposed deficiency, the preponderance of evidence must be decidedly in favor of the libellant, that more grain was laden on his vessel than she delivered on her discharge.

The amount of deficiency being only about five per cent., would hardly justify an inference of misconduct or negligence against the parties sought to be charged therewith; when it may be assumed, upon presumptions equally cogent, that the difference arose from mistakes in computation of weight or measure, in the combined operations of making up the calculation of quantity, or in actual wastage in the process of loading and discharging.

I shall dispose of the case upon this view of the facts, without reference to the question raised as to the jurisdiction of the Court over the subject-matter. Admitting the jurisdiction of the Court, there is not sufficient evidence, in my opinion, to charge the defendant with any loss of corn while on its carriage from Brooklyn to its delivery in New York, and the libel is accordingly dismissed.

The libellant has shown a fair *prima facie* case on his proofs in the first instance, and I therefore impose no costs upon him.

Libel dismissed without costs to either party.

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GOODRICH v. NORRIS.

A bill of lading is to be regarded in a double aspect,—as a *contract* for the transportation and safe delivery of the goods covered by it, at the stipulated freight, and also as a *receipt* for the goods for the purposes of the contract.

In so far as a bill of lading operates as a *contract*, it is conclusive as to the intentions of the parties, and may not be varied by parol evidence.

In so far as a bill of lading operates as a *receipt* merely, it is open to explanation or rectification by parol evidence, as in any other receipt.

The statement of the *quantity* of goods received, contained in a bill of lading, may be rectified in an action by the original shipper, by proof that through mistake the bill was signed for a greater quantity than was actually delivered.

But the proof of mistake in such case must be clear and unquestionable, to rebut the evidence afforded by the bill.

THIS was a libel *in personam*, by James E. Goodrich and others, against John Norris, master of the schooner John I. Adams, to recover damages for the breach of a contract of affreightment.

The libel showed that the libellants had shipped on board the respondent's schooner a number of barrels of tripe, to be delivered to consignees at Boston, and that the respondent failed to deliver five of the barrels,—to recover the value of which this action was brought. The other facts appear in the opinion.

George S. Stitt, for libellants.

I. The respondent cannot contradict his bill of lading. *Creery v. Holly*, 14 *Wend.* 26; *Barnet v. Rogers*, 7 *Mass.* 297. A bill of lading is a *contract*, and is conclusive, especially as against the master; it may not be in all cases conclusive as against the ship-owners.

II. Admitting, however, for the purpose of the argument, that respondent may show a *mistake in fact*, he has not shown such mistake. 1. His witness merely swears that when the vessel was on her voyage they compared the cargo with the

bills, and found but twelve barrels of tripe on board. This is all the testimony produced to prove the pretended mistake. But it does not prove that the eleven barrels mentioned in our bill of lading were not received by the schooner or delivered by the libellants. 2. In this case the respondent had the means of ascertaining the truth, as he undoubtedly did, and there is no pretence of fraud. This is not a "mistake of fact," within any proper sense of that phrase. See *Saltus v. Everett*, 2 *Hall*, 252.

III. The proofs indicate that in fact seventeen barrels were delivered to the vessel.

IV. The libellants claim a judgment for the highest price proved, twelve dollars per barrel, and interest on that amount from the latter part of December, 1846, allowing the ordinary time for a voyage to Boston.

Burr and *Benedict*, for respondent.

I. The objection taken by libellants' counsel, that no evidence can be received to vary the bill of lading, cannot be sustained; because, 1. The libellants were the original shippers of the goods, and as between the shipper and the ship-owner, the bill of lading may be contradicted; (*Abbott on Shipp.* 334;) and, 2. If the goods were never on board, the libellants cannot be injured by having the truth established, though it should contradict, vary, or explain a written instrument signed through fraud or mistake.

II. Upon the question of fact, whether the goods were in fact delivered on board, the evidence is satisfactory that they were not.

BETTS, J. This case rests wholly upon one fact, and turns upon the force and effect of the evidence relative to that fact, offered upon both sides.

On December 3, 1846, the respondent signed a bill of lading, in the usual form, for eleven barrels of tripe, shipped by

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the libellants on board the respondent's schooner, to be delivered at Boston, to the firm of Davis & Whittemore. The bill described the barrels as being "marked and numbered as in the margin," but it contained no marginal marks or numbers.

The vessel arrived at Boston, having on board twelve barrels of tripe, but six only were marked for Davis & Whittemore, and that number were delivered to them. The other six were delivered to other consignees, conformably to their marks. No bill of lading was shown for them, although the mate testifies that he believes one was signed; and he also proves that freight was received for twelve barrels only. He also testifies that no more than twelve barrels were on board the vessel, and that after the vessel got out of port, it was ascertained, by the amount of cargo and by the freight list, that bills of lading had been signed for five barrels more than were in the vessel.

The libellants contend that evidence to contradict or explain the bill of lading is incompetent, and maintain that the respondent is concluded by his signature to the one produced.

This is not the rule as between the original parties of the bill of lading, and where no rights of third persons are in question. In that case evidence may be received to show a mistake in the statement of the quantity of goods received, contained in the bill of lading.

In an action by the original shipper of the goods, the master or owner will be allowed to show that he was induced by *fraud* to sign a bill of lading containing an exaggerated statement of the quantity of goods received; and that such evidence will defeat an action for the recovery of an alleged deficiency in the delivery made, is well settled by the case of *Bates v. Todd*, (1 *Mood. & R.* 106.) That was an action against the owners of the ship *Thames*, on a bill of lading, signed by the master at Singapore, for eight hundred and

ninety bags of pepper. The declaration alleged that *eight* hundred and ninety bags were shipped, and that some of them had been lost. The defence was, that only *seven* hundred and ninety bags were in fact shipped, and that the captain had been induced to sign the bill of lading for *eight* hundred and ninety by the fraud of the plaintiffs' agent at Singapore. It was contended for the plaintiffs, that the bill of lading was conclusive, and estopped the defendant who was owner of the ship. But Chief Justice Tindal held, that as between the original parties, the bill of lading was merely a receipt, liable to be opened by the evidence of the real facts, and he left the question to the jury, whether in fact eight hundred and ninety bags or only seven hundred and ninety were shipped.

The case of *Berkely v. Watling*, (7 *Ad. & E.* 29,) is somewhat broader. The plaintiff there declared, *in assumpsit*, that the defendants, Watling and Nave, were owners of a ship called the *Search*, and that in consideration that the plaintiff, at their request, shipped goods on board, to be delivered to him or his assigns, the defendants promised to deliver them and had failed to do so. Nave pleaded separately, that the plaintiff did not cause the goods to be shipped in the vessel. On the trial the plaintiff produced a bill of lading, signed by the captain of the ship, transmitted to the plaintiff by Watling, which stated the goods to be shipped by Watling, to be delivered to the plaintiff or his assigns. It was also proved that the plaintiff held the bill of lading for value. Evidence was offered at the trial, on the part of the defendant, Nave, to show, that although the master signed the bill of lading for the goods, yet they were never shipped on board the vessel, as therein expressed; and the question was, whether Nave was estopped by the bill of lading from showing that fact. "The statement in the declaration," said Mr. Justice Littledale, "is that the plaintiff caused the goods to be shipped, which is put in issue by the second plea. How does the plaintiff prove his

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allegation? He puts in a bill of lading, which certainly appears to be signed by the master, but, on the face of it, the goods are shipped by Watling. Then the plaintiff must prove Watling to be his agent; by so doing he supports the allegation. It turns out that in fact the goods were not shipped on board the *Search* at all. But the plaintiff says that the defendant, Nave, is estopped from showing this by the bill of lading signed by his own agent. How is he estopped? Watling knew the fact, and his knowledge is the plaintiff's knowledge. The plaintiff, knowing the fact by Watling, his agent, how is the defendant, Nave, estopped by what Watling does as his agent? Since, therefore, the plaintiff, as shipper, is cognizant of the facts, we need not say how far, on the general question, there is an estoppel, but, in my opinion, the bill of lading is not conclusive."

In the case now presented, no suggestion of fraud is made, but the respondent relies upon proof of the mere fact that the goods receipted for by the bill were never actually delivered to the vessel. That fact, if clearly proved, will exonerate the master from responsibility to the original shipper, though it might not release him in an action by an assignee. The bill of lading has, in legal effect, a double aspect. It is a contract for the transportation and safe delivery of the property shipped, and it also embodies, as a matter collateral to that contract, a receipt for the goods so shipped. In so far as the bill operates as a contract, it is, undoubtedly, the exclusive evidence of the obligation of the parties; but in respect to those clauses which operate merely as a receipt for the goods, it has no higher obligation than an ordinary receipt, and is open to explanation and rectification by parol proof. *Phill. Ev.* 3 *Cow. & H.* 1439. The fact that both a contract and a receipt are embodied in one instrument, forms no reason why they should be regarded as differing in effect from similar instruments executed in an independent form.

The clauses in the bill of lading which relate to the quan-

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tity and condition of the goods received, do not enter into the *contract* between the parties; they are parts of the *receipt*. The contract is for the transportation of the goods, for their delivery, for the stipulated freight, &c. But the statements that the goods embraced within this contract have been received on board the vessel, and that they are of such and such description in point of quantity, quality, condition, marks and numbers, &c., are in the nature of a receipt, not an agreement. They are therefore explainable, not alone by evidence of fraud, but by such proof of mistake as is by well-settled rules of law permitted to control the operation of ordinary receipts. It is proper, therefore, to receive the evidence offered on the part of the defence in this case, and if it clearly shows that the goods for which this suit is brought were never, in point of fact, delivered to the respondent, it will constitute a good defence to this action.

On the part of the libellant, the testimony, if not direct and complete, to the fact that the seventeen barrels were delivered on board the vessel, at least strongly corroborated the bills of lading, and may furthermore account for the difference between the quantity receipted and that found on board; as one witness states that he took down five barrels, and another person in the libellant's employment carted down twelve barrels. The latter saw barrels already on the dock, and was told in answer to his inquiry on board the vessel, that they belonged to the libellant's parcel. He left his five barrels on the dock near the vessel, by direction of those on board. He does not remember that he had a receipt given him, but thinks the other man brought back a receipt for his loads. He assisted the other man (who is now at sea) in loading twelve barrels, eleven of which were marked *Whittemore & Davis*, and one to *O. Robinson*. One of those he carted down had the same mark, and the other four were *Russel & Squires*.

The mate's impression is, that six of the barrels were ad-

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dressed to Russel & Squires, and were delivered to them out of the twelve on board. He further says he found four barrels on the dock when the vessel came into her berth, and had them rolled on board. They were marked for Whittemore & Davis; and he further testifies that the twelve barrels were all brought to the vessel by one person. If the evidence of the other cartman is credited, there are then five more barrels which were delivered by him, of which the mate took no account.

Under these circumstances, the testimony of the mate does not destroy the effect of the bills of lading. The written evidence must prevail, and the respondent must be held to account for the five barrels deficient in the delivery.

The proof is they were worth here from \$10 to \$12 per barrel; and the lowest valuation of the goods will be taken in such case, when the evidence carrying them higher is not precise and clear.

The libellant is entitled to a decree for \$50, with interest from December 3, 1846; to this day, and his costs to be taxed.

THE NEW CHAMPION.

A sailing vessel is bound, when navigating in proximity to a steamboat, to take all reasonable precautions to protect herself, and to avoid injury to the steamboat, and she is not entitled to impose upon the steamer the duty to guarantee her against a collision.

If injured by collision with a steamboat, the sailing vessel must discharge herself from fault, and show the adverse vessel guilty of culpable neglect, or want of due equipment or skill, which led to the collision.

THIS was a libel *in rem*, by John Hurley and William Murray, owners of the sloop Mary, against the steamboat New Champion, to recover damages for a collision.

The facts out of which the action arose were as follows:

The steamboat arriving from Hartford in the night time, made her turn on the Brooklyn side of the East River, and was passing across the river to her berth at a wharf in New York. The sloop was at the same time running up with a free wind from the southwest, being close in upon the New York side. Those engaged in navigating her saw the lights of the steamer, and knew that she was on her turn towards the slip, and also what berth she was intending to take.

At the time the steamer starboarded her helm and had commenced coming around, the river was clear in her proper course and direction to her berth. The sloop ran up across the line of the track she was turning into, unperceived on board the steamer, until the two vessels were nearly in collision. A quick order to luff was then given to the sloop by the master of the steamer, but it was not complied with in time, and the collision occurred.

The pilot and master of the steamer testified upon the hearing, that at the time when the order to luff was given, the sloop could easily have been luffed enough to avoid the steamer; and their testimony was corroborated by proof of declarations subsequently made by the pilot of the sloop, to the effect that he gave the order to his helmsman to luff, but that the order was not obeyed.

It was also proved that a good look-out was stationed and kept at the proper post on board the steamer; that her lights were exhibited conspicuously and shining brightly, and that strict precautions were employed on the steamer to avoid collision with other vessels whilst so gaining her berth; that she was coming into her usual and well-known place of landing, and that she pursued the customary method of doing it, as was notorious to vessels navigating the rivers near the docks in this port. It was furthermore proved that the sloop had sufficient time to have luffed and avoided the steamer, had she adopted that manœuvre when the necessity of it was discovered by her.

George White, for the libellants.

I. The question to be considered is not whether the *New Champion* has been guilty of extraordinary neglect; but, Did she, on the occasion on which this collision occurred, observe due care and exercise the proper precaution?

II. Public safety requires that steamboats, particularly when navigating our crowded waters, should observe extraordinary care and unremitting vigilance. The smaller craft are comparatively helpless, but the steamboat possesses and exercises a power to which the winds and the tides are obedient. Her own momentum is unresistingly subject to her control; she is independent of external resistance; and in all cases, it may be positively asserted, wherever the smaller vessel is seen, a steamboat, unless her machinery is out of order, can avoid her.

III. The *New Champion* did not observe ordinary care; no due precaution was taken to avert the collision, although she saw the sloop in ample time to avoid her. Nothing was done on board the *New Champion* but to hail the people on board the sloop, ordering her to luff. The testimony of the claimants' own witnesses shows this.

IV. The sloop *Mary* was comparatively helpless; while the *New Champion* had the full sweep of the river and the entire command of her machinery. The facts, uncontroverted and uncontradicted, are, that the sloop *Mary*, a very small vessel, was pursuing her course up the East River, near the New York side, to avoid a strong ebb tide; while the *New Champion*, a steamboat of a very large class, was crossing over from the Brooklyn side, the sloop and the *New Champion* came in collision with each other; that the *New Champion* saw the sloop when she was about one third or one half of a mile from her, and *saw her distinctly*, although the sloop had no lights.

Now, from the mere statement of these facts, the necessary conclusion must be, that the large and strong *New Cham-*

pion, with a propelling power to which the winds and tides are as implicitly obedient as is her own momentum, could, with a suitable effort, which she was bound to make, have avoided a collision with this little vessel, unless by some positive mismanagement the sloop placed herself in the way of the New Champion, so as to baffle any attempts of the latter to avoid her. Then, did the sloop place herself in the way, unnecessarily, of the New Champion? So far from this being the case, she did every thing she could to avoid the steamboat. She was hemmed in, while the steamboat had the full sweep of the river. Claimants' witnesses, indeed, state, that if the helm of the sloop had been put down, she could have avoided the New Champion. This was the very thing that *was* done; in short, they made every effort on board the sloop, while they on board the New Champion did nothing; whereas, if the sloop had made no effort, no blame could have been attached to her.

BETTS, J. There is evidently a wide-spread misapprehension as to the relative liabilities and privileges of steamboats and sailing vessels, in cases of collision between them. In actions prosecuted against steamers, this Court has repeatedly upheld the rule to be, that sailing vessels are bound to exculpate themselves from blame, and employ all reasonable precaution for their own protection, as well as to avoid injury to steamboats; and that they are in no way entitled to hold their own positions and courses under all circumstances, and rely upon steamers for a full guarantee when navigating in proximity to them. The South American, *MSS.* 1847.

In the case of the steam-tug William Young,¹ (*MSS.* 1844,) a collision occurred between a sloop and a steam vessel, running in opposite directions upon the North River, in

¹ Since reported, *Olcott*, 38.

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consequence of an abrupt variation of the sloop's course. The Court declared that it was not to be assumed that the fault was with the steamer; but the burden of proof was upon the libellant to show her in the wrong; that although a higher degree of responsibility was cast upon steamers, yet a sailing vessel could not be justified in an improper movement on her part, because of an apprehension of encountering an approaching steamer, unless the latter was crowding so much upon her track as to create an imminent danger of collision.

In the case of the steamboat *New Jersey*,¹ (*MSS.* 1846,) it was held that the laws of navigation imposed no peculiar general duties or liabilities on steamboats, in relation to collisions with sailing vessels; but the sailing vessel is bound to use, with reasonable promptitude and skill, all the means in her power to avoid a threatened collision; that it was only because the means at command by steam vessels are so much more efficacious and ready than those possessed by sailing vessels, and because the consequences of an omission to apply such means are so immediately destructive, that vessels propelled by steam are required to use the more watchful precautions; and the rule was there maintained, that the vessel under canvas must contribute to the common security so far as within her power; and that the owners of steamboats were by no means to be made insurers against the negligence, ignorance, or misconduct of persons in charge of sailing vessels.

In the case of the steamboat *Neptune*,² (*MSS.* 1847,) the declaration was reiterated, that steam vessels are not burdened with the sole risks and responsibilities of encounters with sailing vessels. It was stated that the rule is reciprocal, and places both classes of vessels under a common liability and privilege; that a sailing vessel under way was bound to

¹ Since reported, *Olcott*, 415.

² *Olcott*, 483.

exculpate herself from all negligence or misconduct leading to a collision, before she could claim damages against a steamboat for injuries received from her; and it is believed this is the spirit and policy of the marine law.

In each of these cases the proof was, that the collision was occasioned by an improper change of her course, on the part of the sailing vessel, unexpectedly to the steamer, bringing the former suddenly in the track of the latter. There is, however, no doctrine of the law which limits the duty and liability of the sailing vessel to cases of that description alone. It does not rest upon any specific kind of blame occurring in her management; but the general principles of law governing the navigation of vessels nearing each other have their full effect over her, with the exception that she has the privilege to hold her own course, unless it be palpable that she will endanger a collision with the steamer by so doing. Those principles are, that every vessel, however propelled, is bound to exert herself to avoid injury to others in the vicinity of which she is moving, and can found no claim to damages resulting solely from her own culpable want of care, or which are caused by her misconduct. To be entitled even to a contribution to her loss by collision, it must be made to appear there was at least a concurrent fault in the conduct of the other vessel, conducing to produce the collision. The qualification to these obligations is no more than that a steamer is not entitled, as against a vessel under sail, to keep a particular course, but must leave the latter to hold her own when it can be done with safety.

The libellant in this case must prove the steamer was in fault, and must show that his vessel was managed in a prudent and skilful manner, and interposed no needless impediments in the way of the steamer, and was not herself the cause of her own misfortune. *Smith v. Condray*, 1 *How.* 28; *Waring v. Clark*, 5 *Ib.* 501; *The Ligo*, 2 *Hagg. Adm. R.* 356; *The Alexander Wise*, 2 *W. Rob.* 66; *The Woodrop Sims*, 2 *Dods.* 83.

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The sloop, on the occasion, was running close in under the shadows of the city, in a dark night, without showing any lights, and took a course crossing the track of the steamer, at so small a distance that it must be palpable to her that if she were not seen from the steamer and avoided by her, a collision would be extremely probable. She approached the steamer at the time the latter, as her lights would indicate, was working round to get into her slip. When a steamer is in the act of coming about, she cannot command her movements so promptly as under direct headway, and thus the reason for holding her to an extraordinary responsibility is, for the time being, in a measure suspended, as well as the privilege of a sailing vessel in respect to her own course, and this would be so especially in this instance, as the sloop was violating the duty imposed by law upon vessels in port, of showing lights in the night to steamboats coming in, &c. Her master must have been conscious that in so doing, the steamer was exposed to the hazard of coming upon her without warning of her position. 2 *W. Rob.* 1 and 347. I think, upon the evidence, the collision was caused by the inattention and mismanagement of those on board the sloop, and not from any fault on the part of the steamer. The sloop was before the wind, running against a strong ebb tide; and the evidence is clear, that she might, with the greatest facility, have avoided the steamer, had she ported her helm, and that she had sufficient warning that she was in a situation where the steamer must inevitably come in conflict with her. She, however, needlessly and rashly passed into the narrow passage between the wharves and steamer, and thus placed herself within the range the *Champion* must take in swinging around to her berth. This was a gross act of remissness on the part of the sloop, and she has no right to charge the steamer with the consequences of it.

Libel dismissed with costs.

BRADSTREET v. HERON.

The owners of a vessel are excused from fulfilling the engagement of a bill of lading to deliver the cargo at a specified port, by the interposition of sanitary or prohibitory laws controlling them in that respect; for the contract to deliver will be construed as subject to all restraints of government.

A usage of consignees at a particular port to receive shipments during the quarantine season, at the quarantine grounds, as being a compliance with the engagement of the bill of lading to deliver at such port, is valid; and the bill of lading should be construed with reference to it.

As between the original parties to the bill of lading, its statements respecting the *condition of the goods* at the time they are laden on board, may be explained or rectified by parol proof.

But as against assignees of the cargo upon a valuable consideration, the rule is clear that the master and owner are concluded by the representations of the bill of lading.

Consignees are entitled to a reasonable opportunity to ascertain whether goods delivered to them correspond in quantity and condition with the description given in the shipping documents, and the liability of the master and owner remains undischarged during such period.

THIS was a libel *in personam*, by John A. Bradstreet, master of the bark Lowell, against David Heron and others, members of the firm of Heron, Lees & Co., to recover a balance of freight due.

The libel showed that the libellant took on board the Lowell, at the port of New Orleans, 507 bales of cotton, consigned to the defendants at this port, and that the cotton was brought hither and duly delivered to the respondent; and the libel claimed a balance of \$1,756.02, freight due.

The bill of lading was in the following terms: "Shipped in good order and well conditioned, by M. D. Cooper & Co., on board the bark called the Lowell, whereof ——— is master, now lying in the port of New Orleans, and bound for New York, to say, 507 bales of cotton, one bundle containing samples, &c., and are to be delivered in the like good order and condition at the port of New York, (dangers of seas

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excepted,) unto Messrs. Heron, Lees & Co., or to their assignees, &c. July 6, 1847."

The grounds of defence appear in the opinion of the Court. *Edwin Burr*, for libellants.

Luther R. Marsh, for respondents.

BETTS, J. Two objections in bar of this action were relied upon by the defendants. First, that the cotton was not delivered at the port of New York, in fulfilment of the shipping contract. Second, that the cotton, when delivered, was not in good order and well conditioned.

The vessel arrived in the port of New York during the latter part of July, and under the laws of the State was subject to quarantine at Staten Island. The cotton was there discharged on board of lighters employed by the respondents, and was taken to Brooklyn, where it was received and stored by them.

It was not only proved that vessels from New Orleans, at that period of the year, were prohibited by law from landing cotton in the city of New York, but also that it was the established usage for owners and consignees to receive their shipments at the quarantine, as being delivered pursuant to bills of lading engaging to make delivery in New York.

In either point of view, these facts defeat the obligation. The owners of the ship are excused from fulfilling their engagement to deliver their cargo in the city, by the interposition of sanitary or prohibitory laws, which control them in that respect; as the contract to deliver will be construed to be subject to all restraints of government, and that risk consequently falls upon the shipper. The case of *Morgan v. The Insurance Company of North America*, (4 *Dall.* 455,) is an authority upon this point. In that case the cargo was shipped from Philadelphia for Surinam, August, 7, 1799, at which time the colony of Surinam was in possession of the Dutch. The vessel arrived in the River Surinam the 17th of

September following, but meantime the colony had been conquered by the British forces. Permission was obtained from the British commander for the vessel to go up the river to the town Paramanto, which she did, and lay in the harbor for a week ; but the British officers absolutely refused permission to land any article of the cargo whatever, excepting the provisions, whereupon it was brought back to Philadelphia. The Supreme Court of Pennsylvania held that under these circumstances freight was earned. Chief Justice Stillman says : "The owner of the ship has been in no fault whatever. When he took the goods on freight, there was an open commerce between Philadelphia and Surinam ; the goods were carried to the port of delivery ; the vessel waited there seven days, and the captain offered to deliver the cargo to the consignee, who refused to receive it. Nothing prevented it but the prohibition of the British government. It is not like the case of a vessel which is prevented from entering the port of delivery by a blockading squadron, for there the voyage is not performed, and it is impossible to say *certainly* that it would have been safely performed if there had been no blockade. I think it most agreeable to reason and justice, that the obtaining permission to land the cargo should in this case be considered as the business of the consignee. That being established, it follows that the freight was earned."

But furthermore, it is proved in the case that it is the established usage of this port for owners and consignees to receive delivery of their shipments made at the quarantine during the quarantine season, as being a compliance with the engagement in the bill of lading to make delivery in New York. Such a usage is valid, and the bill of lading should be construed in reference to it. *Gracie v. The Marine Insurance Company of Baltimore*, 8 *Cranch*, 75.

Upon these grounds I am of opinion that, independently of the alleged acceptance of the goods by the respondents, their defence, so far as it rests upon the first point taken, cannot be maintained.

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But upon the second ground of defence, viz. : that the cotton, when delivered, was not in good order, it seems to me that, as the case stands, the respondents are not made responsible for the freight.

It was contended, on the part of the libellant, that the consignees were in fact the shippers of the cotton—it having been furnished to the vessel by their agent. This fact, if it had appeared in evidence, would have had a most important bearing ; because, as between the original parties, the representation of the bill of lading as to the condition of the cotton at the time it was received, might undoubtedly be explained or rectified,¹ (*Abbott on Shipp.* 324,) and so, in that aspect of the case, the libellant might have shown, as was attempted, that the damage to the goods was received before they were laden on board. But the suggestion that the respondents in fact shipped the cotton on board through agents, is wholly unsupported by proof. They therefore cannot be regarded as the shippers or owners of the cotton, but must be treated as consignees ; and they prove by their book-keeper, that on the receipt of the bill of lading, they made the shippers an advance of \$21,000 on the cotton, before its arrival in this port. The whole property became thereby, according to the mercantile law, pledged to them for the security of

¹ See the case of *Goodrich v. Norris*, *ante*, 196, where the right of the ship-owner, in an action by the *shipper*, to explain the statements in the bill of lading respecting the *quantity* of goods received, is considered. See, also, on the admissibility of evidence to explain the bill in other respects, the case of *Manchester v. Milne*, *ante*, 115, where it is held that a variance between the quantity of the cargo delivered and that receipted for, may be explained by evidence showing it to be the result of an inaccurate mode of measurement employed ; also, *Zerega v. Poppe*, decided January, 1849, and reported *post*, in its order of date, where it is held, that notwithstanding the acknowledgment that the goods are received in good order, the carrier may, as against the owner, show that the injury to the goods was occasioned by insufficiency in the cask, case, &c. in which they were packed.

their advance, and they are entitled to demand it as described in the bill of lading, *in solido*, or its equivalent, of the ship-owner; his lien for freight being first satisfied. Nor is it necessary to aver such advance in the answer, in order to be entitled to prove it. The pleadings on both sides allege that they are consignees, and they have a right to show the extent of their privilege or lien on the consignment. The rule of law is clear, that the master and owner are concluded by the representations of the bill of lading, as between themselves and third persons entitled to the cargo as assignees upon a valuable consideration. The *Portland Bank v. Stubbs*, 6 *Mass. R.* 422; *Abbott on Shipp.* 323.

Nor can the Court regard the suggestion that the cotton is amply sufficient to repay the respondents their advances, and also to satisfy the freight. I am furnished with no evidence showing the fact to be so. It is accordingly unnecessary to inquire what rule of law would govern, if such a state of facts existed.

There would be a serious difficulty in receiving testimony on the part of the libellant, in the present shape of the pleadings, showing that the cotton was injured by country damage¹ when laden on board, if the suit had been brought by the shipper. The libel avers that it was shipped *in good order and well-conditioned*. The answer admits that fact. Accordingly, independent of the effect and operation of the bill of lading making the same assertions, it would be against the well-settled principles of Admiralty proceedings to receive evidence contradictory to the averments and admissions of the pleadings on the same point.²

The libellant, under the pleadings and bill of lading, was

¹ Dealers in cotton are accustomed to call damage received by cotton while it is yet in the country where it is grown, as contradistinguished from such as is received on board ship, *country damage*.

² See *Davis v. Leslie*, *ante*, 123.

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bound to deliver the cargo of cotton to the respondents in good order and well-conditioned ; and it being fully proved on their part, that when delivered to them it was damaged by water and injured to an amount greater than the balance of freight unpaid, they are entitled to withhold that freight, either by way of recoupment of damage, or upon the ground that the libellant cannot maintain an action on the contract, without showing that its requisitions have been fully complied with on his own part. The Ship Nathaniel Hooper, 3 *Sumn. R.* 549 ; Jordan *v.* The Warren Insurance Company, 1 *Story, R.* 352 ; The Schooner Good Catharine, 7 *Cranch*, 358 ; McAlister *v.* Reab, 4 *Wend.* 483, affirmed 8 *Wend.* 109.

The delivery to the respondents in lighters, to unlade the ship, cannot be regarded such an acceptance of the cotton, on their part, as to conclude them from showing that it did not conform to and fulfil the stipulations of the bill of lading. It is not the usage, nor in most instances would it be practicable, for consignees to inspect and examine shipments when delivered from the ship. A reasonable opportunity must be allowed, after packages and bales come into their possession, to ascertain whether they correspond in quantity and condition with the shipping documents, and the liability of the master and owner remains undischarged during that period.

The damage complained of in this case was not external and exposed to view when the goods were landed, but to its chief extent was internal, and only discoverable by opening and separating the contents of the bales. The disbursements and charges on the part of the respondents in making such examination were \$261.40, which sum they insist they are entitled to retain from the freight. The libel admits payment of the residue of the freight, and only demands this balance. Under the facts in evidence I think that they cannot enforce the payment.

Decree for respondents, with costs.

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A vessel having on board a cargo of flour for transportation, capsized at her wharf before sailing, and the cargo was much damaged. The carriers might easily have communicated with the owners of the cargo, and sought instructions as to the disposal of it; but they neglected to do so, and sold the cargo upon their own authority, at auction; after which the vessel sailed, and in due time arrived at the port of delivery.

Held, 1. That the sale of the flour, under these circumstances, was an unlawful conversion by the carrier.

2. That the owners of the cargo were entitled to recover the value of the cargo at the port of delivery, deducting freight and charges, and adding interest on the balance.

3. That the value of the cargo should be computed by the market price at the port of delivery, at the time of the arrival of the vessel, it appearing that except for the accident, the cargo would at that time, in the ordinary course of things, have been delivered; with a privilege, however, to the owner to claim the amount realized upon the sale of the goods at auction.

Of the allowance of costs upon exceptions to a commissioner's report made in the alternative.

THIS was a libel *in rem*, by James M. Hoyt and Jesse Hoyt against the bark Joshua Barker, to recover the value of goods shipped on board that vessel, but never delivered pursuant to the affreightment.

The owners of the vessel intervened by claim and answer, and contested the action.

The facts in the case were, that in October, 1847, the libellants shipped on board the vessel at Albany, for transportation to the city of New York, a large quantity of flour, to be there delivered to consignees. The bark was secured to the wharf at Albany in such manner, that on the falling of the tide, after the flour was laden on board, she capsized and sunk. This was on October 8, 1847. On the following day she was raised, and the flour taken out and immediately sold by order of the owner of the vessel, without any communication with the consignees or libellants, who were then in New

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York. The bark was pumped out, laden with lumber, and despatched to New York, where she arrived on the 15th of October, bringing to libellants the first intelligence received by them of the loss of the flour.

The cause came before the Court for hearing on the merits, in February, 1848, when the Court, by interlocutory decree, determined that the libellants were entitled to recover in the suit the value of the flour, and directed a reference to a commissioner to ascertain and report its value "at the time when the libellants were deprived of it."

On the hearing before the commissioner, the libellants contended that they were entitled to recover the market value of the flour at New York city on the 15th of October, (the day of the bark's arrival at that port,) with interest from that day, but deducting freight. The claimants insisted,—first, that they were not responsible for more than the amount received from the auction sale, which they claimed fixed the value of the flour for the purposes of the suit;—and, second, that at most they were not liable for more than the market value of the flour at the time of the sale.

The commissioner reported that the market price in New York, of such flour as that shipped by the libellants, was, on the 8th of October, \$4,290.50, and that it was on the 15th of October, \$4,491; referring it to the Court to determine which valuation the libellants were entitled to recover. He also reported the amount due for freight and for interest.

The sum received by the claimants from the auction sale of the flour was \$3,648.88.

The cause now came up on exceptions by the claimants to the commissioner's report.

E. Ellingwood, in support of the exceptions.

C. Van Santvoordt and *Henry E. Dodge*, opposed.

I. By the phrase "the time when the libellants were deprived of the use of their property," referred to in the decree, in the connection in which it is used, and in reference to the

subject-matter of the suit, must be understood, the time when, under the circumstances of this case, the claimants should have delivered the property in question in New York. This construction is according to the rule of law, and the only one which will afford the libellants adequate indemnity. *Arthur v. The Cassius*, 2 *Story, R.* 81; *Amory v. McGregor*, 15 *Johns.* 24; *Sedgwick on Damages*, 370, 372. Upon a contract to deliver goods, the general rule of damages for non-delivery is the market value of the goods at the time and place of the promised delivery. 2 *Greenl. Ev.* 215, § 261. The same principle applies to this case. See *The Commercial Bank v. Kortright*, 22 *Wend.* 348, and cases cited.

II. Instead of selling the flour without consulting the owners, which they might have done in a few minutes by telegraph, the claimants should have put the flour back again, and it should have been delivered at New York on the arrival of the boat on the 15th of October last, when, for the first time, the libellants had notice of the loss of their property. The damage to the flour would then have been measured by the difference between what the flour sold for and the market value. There was no necessity for selling it, and the claimants had no right to sell it. *Arnold v. Hallenbake*, 5 *Wend.* 33. As to the time of delivery, the extent of the carrier's liability is to deliver within a reasonable time, and what time is reasonable must depend on the circumstances of each particular case. *Story on Bailm.* § 545 *a*, ed. 1846; *House v. The Lexington*, 2 *N. Y. Leg. Obs.* 4.

III. The libellants, therefore, ask for a decree for the amount found due upon the valuation of the flour of the 15th of October last, the time of the arrival at New York of the Barker, and of the first notice to the libellants of the loss.

IV. But if the libellants are not entitled to the amount found due on that valuation, then, although this does not amount to an indemnity, they ask for a decree for the amount found due on the valuation of the 8th and 9th of October

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last, when the property was wrongfully sold at a sacrifice, and the money withheld from the libellants, to force them to agree to the claimants' terms.

V. The allowance of interest is expressly provided for in the decree, and is proper in this case. In cases where interest has been withheld on the value at the port of destination, in suits against carriers, it has been expressly on the ground that the loss complained of happened by misfortune, without any *fault* or *misconduct* on the part of the carrier. It was not misfortune, but gross misconduct on the part of the claimants to sell the flour, and retain the use of the proceeds, (nearly \$4,000,) and during a time when money has been worth more than legal interest. There never was a case where interest was disallowed when the defendants had converted or received the proceeds of the property; and this is the foundation of the rule allowing interest in actions of trover.

BETTS, J. The answer admits that the flour was taken out of the bark at Albany, after her disaster, and immediately sold, and that the sale was made without authority from the libellants. It is matter of notoriety that communication could have been had with the owners of the flour at New York in a few minutes, by telegraph, and their instructions thus taken on the subject; and also, that the regular mail conveyance by steam from Albany to New York and back, is made within forty-eight hours, while by the ordinary running of the steamboats, a special messenger could have obtained orders in New York, and returned with them to Albany within twenty-four hours. Under these circumstances, the acts of the claimants, in making peremptory sale of the flour at their own discretion, immediately on the bark being raised was, in respect to the rights of the libellants, unnecessary and wrongful. The libellants were accordingly entitled to charge the claimants with the full value of the flour laden on the vessel and not delivered at the port of destination, as tortiously disposed of by them.

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No case of necessity for the sale being shown by the claimants, the fact in proof that subsequently to the sale they demanded of the libellants the allowance of an account against them, amounting to \$1,175.15, arising upon prior distinct transactions, before they would pay over the proceeds of the flour, indicates that the claimants assumed the power to dispose of the flour at their own discretion, and having its avails in hand, to force the libellants to a settlement of antecedent dealings between them, as a condition to their accounting for the conversion of the property. Common carriers cannot coerce payment of debts in that manner out of property committed to them for conveyance. This would be an abuse of the bailment, amounting to a trespass. They have not power, in any emergency, to sell the entire bailment, so as to give a purchaser title to it against the bailor or shipper. *Arnold v. Hallenbake*, 5 *Wend.* 23. Upon the general principles of mercantile law the libellants are entitled to the full value of the property at the port of delivery. *Watkin v. Laughton*, 8 *Johns.* 213; *Amory v. McGregor*, 15 *Ib.* 24; *Brackett v. McNair*, 14 *Ib.* 170; *Gillingham v. Dempsey*, 12 *Serg. & R.* 188; 12 *Barn. & Ald.* 932. And the wrongful disposal of it also justifies imposing interest on carriers. See same cases. Interest is the appropriate recompense in case of loss of property by the fault or misconduct of another. 17 *Pick.* 1; 21 *Ib.* 559; 1 *Metc.* 172; *Stevens v. Low*, *Hill*, 132.

The exceptions raise the question whether the libellants can demand more than the value of the flour at the time it might have been reasonably delivered at New York if it had not been sold. This point becomes material, because between the 9th of October, when the bark, in her ordinary course of navigation, might have reached New York, and the 15th, the time of her actual arrival after being raised, the price of flour was materially enhanced. The commissioner reports the difference upon this shipment to amount to \$200.50.

The delay of the vessel in this case was merely temporary.

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The accident did not disable her from completing her voyage, and it was well known, when the flour was taken out and sold, that the bark was uninjured, and that she could be immediately despatched to her port of destination. The interruption was no more than a circumstance which prolonged her voyage. The delivery of the flour at New York on the 15th could incontestably have been made within the undertaking of the claimants, and the libellants must then have accepted it, subject to compensation for the injury it had received. Carriers by water are liable for the actual value of goods withheld or lost, without legal excuse, computed at the time when the goods might have been delivered at the place of destination. *Arthur v. The Cassius*, 2 *Story*, 81; *House v. The Lexington*, 2 *N. Y. Leg. Obs.* 4. The arrival of the vessel herself (she not having made intentional deviation) on which the goods were laden, would ordinarily be received as satisfactory evidence of the time at which the delivery might reasonably have been made. Casualties which should retard the arrival beyond the usual period would not vary the rule so as to enable the consignee to charge the carrier upon the footing of a wilful or unreasonable delay. Accordingly, when the goods are sold, or applied to the necessities of the ship during the voyage, the measure of compensation to the owner is the clear net value at the port of destination, as the market stands on the failure of the ship to deliver the goods; with the privilege, however, to the owner, to take the sum for which the goods actually sold. *Abbott on Shipp.* 455. And the inquiry as to value does not seem, from the authorities, to turn at all upon the consideration, whether without the accidental delay, the goods would have come into a better market. In a case of tort, the owner, doubtless, might have taken either period for fixing his damages; that at which the wrong was done and his property destroyed or converted, or that at which he might have had possession of it but for the wrongful act; and where he has notice he might be compelled

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to declare at once his election. But I do not pursue that question, because the laches of the claimants prevented the libellants insisting upon having the property delivered to them in its then condition, which could have been easily and safely done in a few hours ; and also, because the arrival of the vessel, notwithstanding her misadventure, was in a reasonable time after the flour was laden on board ; and the libellants are, accordingly, entitled to take the time of her arrival as that at which the value of her cargo, put on board, shall be determined.

I think that the finding of the commissioner, that the flour was worth in New York, on the 15th of October, \$4,841, is justified by the proofs.

In addition to the deduction of \$350, admitted by the libel and answer to be properly allowable, the freight from Albany to New York, amounting to \$70, is also to be deducted as composing in part the value of the flour at New York. The libellants will therefore take a decree for the balance, of \$4,421, with interest thereon from October 15, 1847, to the date of the final decree, together with their costs to be taxed.

Costs will not be allowed to either party upon the exceptions. They are not allowed against the claimants, because the report is in the alternative, and does not fix definitely the sum with which they are chargeable, and because they are not allowed by it the freight to which they are entitled. And costs are not allowed against the libellants, because the claimants are defeated upon the merits of the exceptions to the report, and because the refusal of the commissioner to allow the freight, was the consequence of the inadvertent admissions of the claimants in their own answer.

Decree accordingly.

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There is no determinate rule of law absolutely distinguishing *towage* service from *salvage* service.

Salvage service is such service as is rendered in rescue or relief of property at sea, in imminent peril of loss or deterioration.

Towage service is aid rendered in the propulsion of a vessel, &c., irrespective of any circumstances of peril.

Towing may be a *salvage* service, when performed in aid of a vessel in distress.

Where there is a hiring or bargain *bonâ fide*, and free from fraud or mistake, for aid to be rendered by one vessel to another in distress, the terms of such agreement are adhered to as the rule of compensation; but where no agreement is made, the rate of remuneration for such services is to be governed by the considerations applicable to *salvage* cases.

A vessel laden with a valuable cargo, being overtaken by a storm while entering the harbor of her port of destination, was left by her crew, wholly crippled and unnavigable, and in a situation where a recurrence of severe weather might have produced a total loss, yet lying in the mouth of the harbor and within ready reach of assistance. A steamer, engaged in the business of towing vessels to and fro in the harbor, went out to her relief, reaching her just as another steamer of like occupation was approaching, with a view to render similar assistance, and took her in tow and brought her up to the wharf; the entire time consumed being five hours, and the severity of the storm having abated.

Held,—1. That this was a case for *salvage* compensation, and not one of mere *towage* service.

2. That it was not a case of legal derelict, nor one entitling the salvors to extraordinary compensation.

3. That \$250 was a reasonable compensation for the service rendered.

A mere attempt to negotiate a compromise of a claim at an amount specified, unaccompanied with a tender or direct offer to pay such amount, does not operate as an equitable bar to costs.

THIS was a libel *in rem*, by Oroondates Mauran and others, the master and owners of the steamboat Samson, against the schooner H. B. Foster, to recover compensation for *salvage* services rendered to that vessel.

The facts in the case, as they appeared by the pleadings and proofs, are stated in the opinion of the Court.

W. K. Thorn and W. Q. Morton, for the libellants.

Francis B. Cutting, for the claimants.

I. The libellants have not established a case which entitles them to any extraordinary compensation for their services. Although, upon the afternoon of Saturday, they had reason to believe that the lives of those supposed to be on board of the schooner were in jeopardy, they both declined to assume any risk or hazard themselves, and neglected to impart their information to others who might have volunteered to assist those then believed to be in distress.

II. The case lacks all the elements of a case of meritorious salvage service, as these elements are stated in *The Clifton*. (3 *Hagg. Adm. R.* 120.) Nor are there any circumstances connected with the towing of the schooner which entitle libellants to any unusual compensation. No lives were saved, and the schooner was in perfect safety when the steamboat reached her.

III. The conduct, on Sunday morning, of those on board the steamboat, shows, in several particulars, more eagerness to secure a prize than to save property. 1. Another steamboat was on her way, and was in sight of the schooner. The libellants, in their haste, slipped the cables, and left the schooner without ground tackling to protect her in case of accident. 2. They omitted the obvious duty of attaching a buoy to the anchors, so as to mark the spot where they were left. Their excuse that the anchors were twisted, ought not to avail them, because they made no effort to extricate them. They pretend that they could not find the brakes of the windlass; but there ought to have been handspikes or other means belonging to the steamboat by which the anchors could have been extricated.

IV. In *The Neptune* (1 *W. Rob.* 300,) it was held that salvors must show that they possessed skill commensurate with their vocation and condition in life, and adequate to the demands of the service which they undertook to perform. In the present case, it appears that the *Samson* started for the

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relief of a vessel in distress, with a crew short by one man, and ignorant of the soundings and navigation, and without handspikes or other means to get up anchors. .

V. The steamboat was absent, engaged in rendering the service, only about five hours. Under the circumstances, the libellants ought to be allowed little if any more than a mere remuneration *pro opere et labore*. The case can scarcely be considered a case of salvage service; and if it was something more than mere towage, the schooner having sustained some damage, yet the compensation ought not greatly to exceed towage compensation. The Reward, 1 *W. Rob.* 174; H. B. M. Frigate Thetis, 3 *Hagg. Adm. R.* 62. Here the claimants offered \$150, or three times the ordinary compensation allowed by the usage of the harbor for towage for an equal length of time; and went so far as to inquire if \$250 would be satisfactory, intimating a willingness even to pay that sum to avoid litigation. The libellants ought to have accepted this offer, or at all events to have manifested some disposition to settle upon reasonable terms; instead of which they hastened to file their libel, and demanded fifty per cent. on the vessel and cargo.

VI. Even in cases of *derelict*, the rule is not invariable that one half should be awarded. The principle, as now established, is, that a reasonable compensation shall be given; but the amount is discretionary. *Abbott on Shipp.* 555.

VII. The schooner was not a legal derelict. She was fastened by her anchors within the bay of New York. The *spes recuperandi* was not gone, nor was the *animus revertendi* abandoned. Her crew intended, as the testimony shows, to have returned. Under these circumstances she was not derelict. The Bee, *Ware*, 332; The Upnor, 2 *Hagg. Adm. R.* 3. *E. Paine*, for the claimants of the cargo.

BETTS, J. The libellants, owners and master of the steam-

boat Samson, for themselves and others, demand a salvage compensation for the relief and rescue of the schooner H. B. Foster and her cargo.

The facts upon which the decision rests, only will be stated ; and they, upon the pleadings and proofs, are these :—

The schooner, on March 26, 1847, arrived inside of Sandy Hook from St. Croix, with a cargo of sugar, rum, and molasses, of about \$12,000 value. The schooner was worth from \$1,600 to \$2,000, dismantled, and about \$3,000 when fitted for sea.

She anchored under the West Bank at about half-past seven, P. M. It came on to blow a gale, with a heavy storm of snow and rain ; and during the night the schooner dragged her anchors, and continued to drag the next day, till half-past one, P. M. The masts were cut away at eight A. M. Wind was N. and W. N. W.

About three o'clock in the afternoon of the next day, (Saturday, the 27th,) the storm ceased and the wind moderated. The schooner struck bottom two or three times after the masts were cut away, but not with violence, and no injury was produced by it. She made no water in consequence.

She had dragged a distance of two and a half miles to the Eastern Bank, and brought up in from thirteen to fifteen feet water, at nearly low tide, on her outside, and about eleven feet on the shoalest side, and distant about four miles from Coney Island, and six or seven from Sandy Hook.

“ The sea broke over her the last time at about three, P. M., and at about four, P. M. she struck once. The pilot stated that the master and crew were frightened at her striking. When she last struck, the master jumped from his berth, and said, “ This won't do ; we must go ashore.” The crew all rushed to go ashore. All on board, nine in number, immediately left the schooner in a small boat for Sandy Hook, taking nothing from the vessel. The wind was still blowing hard, and so as to render it, in the opinion of the pilot, very

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dangerous to attempt going to Sandy Hook, a distance of six or seven miles, in that boat,—more dangerous even than to remain with the schooner.

The next morning (Sunday) the wind was fresh, but not so as to render it dangerous for steamboats to navigate the bay, or to go to and alongside the schooner.

The principal employment of the steamboat Samson is to tow vessels to sea from New York, and in from sea to the port, and also to go to the assistance of vessels within and outside the harbor, requiring aid. When engaged for such service, her compensation is \$10 per hour, from the time of leaving on the expedition to her return. This is the common rate allowed steam-tugs in the harbor for that description of services, others also being engaged in it. When no bargain is made, and either party refuses to be governed by the customary price, the rate is adjusted upon the principle of a *quantum meruit*.

About noon on Saturday, the schooner was seen by a person residing near the light-house on Staten Island. He went to the wharf of the libellants on the Island, to give notice of her situation. A letter was written to the master of the Hercules, (another steamer employed in towing, &c., and owned by the owners of the Samson,) then in New York, superscribed to be "on urgent business." In the absence of the master of the Hercules, it was delivered to the master of the Samson, between four and five, P. M., of that day.

It stated, "There is a vessel of about 200 tons lying in the lower bay, with all her masts gone. She is between the East Bank and Romer, and requires immediate assistance, as the sea is making a complete breach over her, rendering it impossible for her to be seen, except at intervals."

The wind at the time was blowing so heavily that the master of the Samson declined going down, and said he should not be able to assist another vessel, or do more than take care of his own boat in such weather, but he would go for her if the wind lulled.

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Steam was put on the boat, and she was kept in a condition to leave till between nine and ten, P. M. The master then left her and went to his house, with orders to have steam on again at four the next morning. He was called at that hour, but considered the wind too violent to justify his going out. At five, he concluded the wind had abated; he got under way for the schooner, and finding he could navigate safely, he kept on slowly to her, and reached her between seven and eight, A. M. These are the representations on the part of the libellants.

The weight of evidence in the case is, decidedly, that the weather at that time had become moderate, so as to render it perfectly safe for boats of the size and power of the Samson to go to and from the schooner, and tow her in any part of the bay. She was brought up to the Quarantine in tow by the Samson, a little after nine o'clock, and the whole time she was engaged in going and returning to the city was about five hours.

The tug was run close to the quarter of the schooner, near enough for one of the men to jump on board. A hawser was secured to the bow of the schooner, her cables slipped, (being foul, which rendered it difficult to raise her anchors promptly,) and she was then towed up to the city, without impediment or difficulty.

This general outline of the facts is sufficient to bring under consideration the two main questions on the merits discussed between the counsel. These are—first, whether the services rendered the schooner were salvage services or mere towage—and, second, if they are regarded as salvage services, whether the schooner was at the time *derelect*, so as to entitle the salvors to the scale of compensation usually applied in cases of *derelect*.

I am not aware of any determinate rule of law which discriminates towage service from salvage. It is manifest that circumstances may exist rendering towage the most efficient,

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if not the only service, which can be afforded in saving property and life. A dismantled and disabled ship of large burden, filled with passengers, may be thus rescued by a very small vessel, wholly inadequate even to receiving on board the sufferers on the wreck. It has, therefore, never seemed to me that any advance was made towards solving the question, whether a service was salvage in its character, and to be rewarded as such, by proving that it was performed by towing only.

If there is any intrinsic difference between towage and salvage, it would appear to be only that salvage service must always be that given in rescue or relief of property in imminent peril of loss or deterioration, while towage may be applied merely in aid of a vessel against adverse winds or tides, or in difficult passages, while she is in possession of her ordinary powers of locomotion.

Sir Stephen Lushington says, in the case of *The Reward*, (1 *W. Rob.* 177,) "mere towage service is confined to vessels that have received no injury or damage, and mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident."

In that case, a ship going to sea grounded. She was got off with the loss of her two best anchors and cables, and with the starboard end of the windlass and bulk-head carried away. She was proceeding back to repair damages, when she fell in with a steam-tug, and accepted its services to tow her into the dock. She tendered £17, which was the rate established for towing (greater distances) by the company owning the tug. The tender was refused, and the Court held the service was salvage, and awarded £80. 1 *W. Rob.* 176. See, also, 2 *lb.* 294.

In *The London Merchant*, (3 *Hagg. Adm. R.* 396,) £400 salvage was allowed a steam-tug for towing a vessel off the rocks and into harbor. See, also, *The Meg Merriles*, 3 *Hagg.*

Adm. R. 346, and note. No other assistance than towing was rendered by The United Kingdom, and £800 salvage was awarded. 3 *Hagg. Adm. R.* 401, note; S. P., The Earl Grey, *Ib.* 386; The Traveller, *Ib.* 370.

Sir John Nicholl lays down the rule, that if towage leads to the rescue of a vessel from danger, it should be remunerated as salvage. The *Isabella*, 3 *Hagg. Adm. R.* 428. In The *Industry*, (3 *Hagg. Adm. R.* 203,) £143 salvage was awarded a pilot smack for towing a brig into Cowes' roads. See, also, The *Sussex*, *Ib.* 339.

The condition of the schooner was such, when the *Samson* came to her, as to constitute the assistance given her a salvage of vessel and cargo, in the proper acceptation of the term. She was utterly unmanageable and helpless, and without a crew or guard to protect her and the cargo. It was no less so than if the libellants had boarded the schooner, fitted up masts, sails, and steering apparatus, and brought her into port by such means of self-navigation, or had even transferred her cargo to the steamer. The difference would only have been in the greater amount of labor, exposure, and peril.

So, also, compensation is awarded upon a common principle, whatever may be the method by which the relief is effected.

The cases above cited afford sufficient exemplifications of the application of the rule, where the service has been by towing, to dispense with the necessity of fortifying it by further references.

When there is a hiring or bargain, *bonâ fide*, without fraud or mistake, the terms of such agreement are adhered to as the rule of compensation. But if no agreement is made, settling the terms on which aid will be given by one vessel to another in distress, remuneration is awarded with regard to considerations appropriately governing salvage cases. The *Britain*, 1 *W. Rob.* 40; The *Betsey*, 2 *Ib.* 167; The *True Blue*, *Ib.* 176; The *Mulgrave*, 2 *Hagg. Adm. R.* 70; The

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Traveller, 3 *Ib.* 372. The same principle may be considered as involved in *The Zephyr*, 2 *Hagg. Adm. R.* 43. Sir John Nicholl, however, intimates that if an engagement even were made to tow, unforeseen circumstances may convert such towage into a salvage service. *The Isabella*, 3 *Hagg. Adm. R.* 428.

On the second topic of discussion, I do not deem it important to review the cases relied upon on each side, or weigh very scrupulously the facts or principles connected with the subject; for if it be conceded that the schooner for the time being, and when taken in charge, was technically a *derelect* in respect to her crew, that circumstance would in no way determine the scope of compensation to which the libellants would be entitled. *Abbott on Shipp.* 660, notes.

She was not *derelect*, in the sense of being, at the time helpless of relief except by the aid of these libellants. She lay safely at anchor in the bay. The danger of the storm was over. She had been seen the day previous from Staten Island, and that morning she was visible from Sandy Hook, and, of course, would be from the nearer vicinity of Coney Island and Staten Island. Another steamboat was directly in the rear of the *Samson*, going down the bay, for the purpose, among other objects, of looking out for this schooner. *The Boston*, 1 *Sumn.* 337.

Contingencies might occur in her then condition and position, making it highly desirable and advantageous to her to be immediately taken into port. But prospective and possible calamities which might attend her remaining there, do not constitute a case of imminent peril, especially where other resources for aid and relief are at hand. *The Emulous*, 1 *Sumn.* 215.

The circumstances amount, in my judgment, simply to a case of salvage of a vessel laden with a valuable cargo, wholly crippled and unnavigable, and placed in a situation where a recurrence of severe weather might have produced a total loss; but lying in the mouth of her port of destination, at

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anchor, and within ready reach of assistance, with competent aid going to her relief, and already very near to her, when the libellants took her in possession.

But I regard the allegation of the defence set up that the steamer Duncan C. Pell was surreptitiously prevented by the libellants from relieving the schooner, as not supported by the proofs. There is probable cause to suspect it was known on board the Samson that the Pell contemplated running to this wreck, but it being proved that other vessels in the vicinity were aground, or injured from the effects of the storm, there might be reasonable grounds with the master of the Samson to suppose the Pell was not specially destined to the schooner, and was out on a general adventure, to give assistance where it might be desired. It was well known to the Samson that the Pell was employed ordinarily in towing vessels, and affording them assistance as required.

Both steamers were wreckers as well as towing-boats, and it is to be assumed, that after the tempest, they would, in pursuit of their vocation, be on a cruise to render aid wherever it might be needed, and that their object would be mutually well understood; and neither was bound to give place to the other, and avoid visiting a wreck which she supposed her competitor might intend going to. Although this fact does not take away a just claim to compensation, it is certainly not without influence in determining whether the interposition of the Samson was valuable to the salved vessel, in an eminent degree; and so, also, it becomes an element of weight in determining the salvage to be awarded.

The particulars in evidence in the cause tend to diminish any claim to extraordinary compensation for the services rendered. Had the Samson gone down and relieved the schooner and her crew on Saturday afternoon, when apprised of their situation, her gallantry and exposure in the act, equally with the rescue of life and property, then in serious hazard, would have entitled her to the highest grade of reward. The Clif-

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ton, 3 *Hagg. Adm. R.* 117. But on Sunday, so far as the danger to the steamboat or her crew, or the safety of those on board the schooner was concerned, the aspect of things was wholly changed. The libellants, as is most natural, magnify their labors and exposure, but facts independent of their testimony demonstrate that the service could have been no more than a very ordinary one, for with less than her full complement of men, the tug ran the distance to the wreck, fastened to her, and towed her alongside of the wharf in New York, in five hours.

The evidence of other witnesses on the bay at the time shows the weather to have become fine, and it is also to be remarked that the *Samson* was not taken from or delayed in other business, or subjected to hazard which might jeopard her insurance as if only a passenger or freight boat, for this was no more than part and parcel of her daily and ordinary employment in towing vessels in and out of the harbor, or giving assistance to those in distress.

The original libel, filed on the 2d of April, alleged, "that on Sunday morning, March 28, about 6½ o'clock, as the libellant, &c., in the steamboat *Samson*, was going down below the Narrows to look for vessels coming in and needing a tow-boat, he discovered the schooner," &c.

This averment was substituted on the 15th by an amendatory one, alleging that the boat went down in consequence of a previous notice, &c.; but the claimants have a right to invoke that allegation as an admission on record, attested by oath, in corroboration of evidence showing that the tug did not go out of her common line of business, or assume a hazard beyond what was incident to her calling, and was anticipated; and no fair ground for doubt exists that if she had been applied to by any person interested, she would have gone down and towed in the schooner that morning, for the usual compensation of \$10 per hour.

No such agreement having been made, she is now entitled

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to lay the case before the Court, and demand payment commensurate to the merit of the act, considered as a salvage service.

The claimants impute to the libellants a want of due skill and care in not raising the anchors of the schooner, and also in slipping the cables without attaching buoys to them; and that they have been compelled to pay other wreckers \$75 for searching for and raising the anchors, and restoring them to the schooner. I think, however, on the proofs, that as the cables were foul, and considerable time must have been necessary to extricate them and raise the anchors, and as the tide was falling, and there might be danger, in case of a slight swell, that the schooner in that depth of water would ground on the bank so as either not to be easily moved off, &c., or by thumping to spring a leak, to the injury of the cargo, the course taken by the libellants was prudent and justifiable, not to risk the vastly greater value of vessel and cargo for the purpose of saving the anchors, even if their total loss might ensue from slipping the cables. Such loss was not to be apprehended, as the shoalness of the water and the known position of the schooner would leave little doubt that they could be easily recovered in calm weather.

After the libel was filed, the owner of the schooner sought a compromise with the libellants. He claimed that they were responsible to him for the value of the anchors and chain-cables, but proposed to settle the matter by relinquishing that claim, and paying \$150. That proposition they peremptorily refused. He then inquired whether an offer of \$250 would be accepted, and was given to understand that would be rejected also.

The libellants claim a large percentage upon the proved value of the schooner and cargo, say, \$14,000; and, on the argument, it is put at from one third to one moiety, the familiar allowance in cases of derelict or desperate stranding. *Abbott on Shipp.* 666, note 1.

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Enough has already been stated to evince that the Court does not regard the libellants entitled to any extraordinary compensation. I have perused all the cases cited, in which the subject has been passed upon; but it is manifest, that beyond the recognition of the general principles composing the doctrine of salvage reward, and a few facts of a pervading and permanent character which may serve as guides to the discretion of the Courts, the cases must each have been determined essentially upon particulars peculiar to itself.

Other circumstances being alike, steamboats, as having the ability to render more prompt and efficacious assistance than sail vessels, are encouraged by a more liberal reward. The *Raikes*, 1 *Hagg. Adm. R.* 266. This is most rightfully so, when they turn aside from their voyage, or leave other pursuits to go as mere volunteers to vessels in distress.

This doctrine has certainly less force applied to them as professional wreckers and towers. Their intrinsic superiority to sail vessels for such service, will secure them the preference in that employment when they can be obtained, and thus the calling of itself will be sufficiently encouraging and advantageous, without the aid of the stimulus of high salvage rewards.

At most, in reference to mere harbor service, and that rendered about the mouths of their own ports, it is by no means manifest, that steamers whose regular pursuit is to tow and relieve vessels, should be regarded as meriting a reward out of all relation and proportion to what would have been accepted as satisfactory on a fair bargain for their services. When the steamer is employed under contract, she receives full pay, whether she brings in the vessel she is sent for or not, and of consequence can afford to place a lower price on her employment than if the enterprise was entirely at her own expense and risk. This consideration should not be overlooked in measuring the reward in this case, where the libellants assumed the hazard of wasting the day at their

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own charge, with, perhaps, exposure of the boat and her machinery to more or less damage; and it certainly would tend to retard their adventuring in like undertakings without the security of an express promise, if they, after assuming the hazard and expense and loss of time without reward, were still to be left, as to compensation, on the same footing as if under regular hire.

Giving the most liberal weight to these considerations, and viewing this case in the light of its special circumstances, I shall award the libellants \$250, and their taxed costs.

No offer of payment was made by the claimants in such manner as to operate an equitable bar to costs. No more was done by the claimant than attempt at negotiation for compromise. On failing in this he should have made a regular tender, if he relied upon his offer as amounting to full satisfaction of the demand.

The charge of embezzlement against the libellants I consider fully repelled by the proofs. *Decree accordingly.*

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A steam vessel running into harbor, or through the common thoroughfare of other vessels, is bound to take extra precaution against collision with sailing vessels; and in the night, or in case of a fog, must move with great circumspection, or even lay-to or anchor, according to the danger of encountering other vessels.

A sailing vessel at anchor or lying-to in a dark night or in a dense fog, is also bound to take such precautions as may be in her power, to give warning of her position to other vessels, whether steamers or vessels under canvas, which may be nearing her.

Under the usages of navigation upon Long Island Sound, the blowing a horn, the ringing a bell, or the beating upon an empty barrel or upon an anchor, is a reasonable precaution which a sailing vessel lying-to in a fog is bound, as towards a steamer which may come in collision with her, to take, in warning off such steamer. (Since reversed.)

The rule of equal contribution should be applied in cases of damage caused by a collision for which both colliding vessels are mutually in fault.

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THIS was a libel *in rem*, by Goldsmith Wells and others, owners of the schooner Oriana, against the steamboat Bay State, to recover damages for collision between those vessels.

The facts out of which the action arose, are fully stated in the opinion.

Francis B. Cutting, for the libellants.

Daniel Lord, for the claimants.

BETTS, J. The facts directly pertinent to the merits of this case are these :—The schooner Oriana, laden with coal, on a trip to New Bedford, was, at six o'clock, on the morning of August 13, 1847, at a point distant about six miles to the southeast of Watch Hill Light, and about thirty-five miles from Newport. She had her sails up and was under way, but there was nearly an entire calm, and the vessel was making little or no progress through the water. There was a dense fog at the time, so thick that vessels could not be seen a distance beyond one hundred to two hundred feet off.

The steamboat Bay State had lain-to on account of the fog at Mount Hope, and left Newport between three and four o'clock, A. M., that morning. She was running at the rate of sixteen miles the hour, and came within one hundred to one hundred and fifty feet of the schooner before discovering her.

So soon as the steamer was discerned from the schooner, the crew of the latter cried out with all their force, and the cry was indistinctly heard on the steamer. The steamer was then pointing to about midships the schooner. Her engine was stopped as quickly as possible, her helm thrown apart, and all the sheer given her that the space permitted. She struck the schooner on her larboard quarter, twelve or fourteen feet from her stern; the schooner sunk in a few minutes, and with her cargo was a total loss. The vessels were in effect on the open sea, being east of Block Island, and in the

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lower part of Narsagansett Bay, with nothing intervening on the east and south between them and the ocean.

It is the practice of this steamboat to run in the open parts of her passage, through fogs, at her full speed, determining her position by her course and time. On this occasion, the master and two pilots were in the wheel-house, keeping a look-out, and a man was stationed at the large bell of the boat to ring it from time to time in warning to other vessels. The bell had been rung immediately before the collision. It was proved that the beating of her wheels, on the approach of the steamer, could be heard on the water, in a calm, fourteen or fifteen miles, and in ordinary weather from six to seven miles. The large bell is heard usually from one to four miles.

The schooner had anchored the night previous about four miles from Watch Hill, on account of the fog, and lay there until 5 A. M. of this day. She was got under way with a light breeze, and ran by compass E. by N. about 20 minutes; and the breeze then having died away, she was hove to, heading S. S. E., the water being free from swell, and smooth. She lay about 20 minutes, when the steamer was seen approaching her from the eastward, about one hundred feet off. During the night, while at anchor, persons were kept on her deck, beating with sticks on empty hogsheads, at short intervals, to give warning to other vessels. The testimony shows that noises from pounding on empty casks and anchors on board vessels are heard in the night time, or in a fog, on board steamers under way, a sufficient distance off to enable them to keep clear of vessels giving the signal. In this case, it was proved that those on board the schooner heard the steamer approaching fifteen minutes before the collision.

It has been repeatedly decided that vessels propelled by steam, and running into a harbor, or through a common thoroughfare of other vessels, will be held chargeable with the consequences of collisions, when kept at high speed dur-

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ing the night, or in weather so thick that objects in their way cannot be discerned at a distance sufficient to afford time to escape them. *Bullock v. The Steamboat Lamar*, 8 *Law Rep.* 275; *The Perth*, 3 *Hagg. Adm. R.* 414; *The Rose*, 2 *W. Rob.* 1; *The Neptune*,¹ (*MSS.*) February, 1847.

No blame is, however, to be implied against steamers who use their full power out on the high seas, and when there is no indication of other vessels in their track, and when no circumstances are known to them importing the necessity of extraordinary caution.

The place of the disaster in question partook of both characters. It was strictly on the open sea, on the ocean, as distinguished from the navigation of the Sound; but it was only a few miles from land, and in the range of vessels seeking ports in Rhode Island or Massachusetts from the Sound, or coming into the Sound from those places, or going out to, or coming in from the sea.

The master of the steamboat is chargeable with knowledge of these facts, and he would have been bound to take proper precautions against meeting or overtaking sailing vessels in that vicinity, if the wind had been sufficient to enable them to run with their sails. Then the darkness and obscurity from fog would impose on him the necessity of moving with great circumspection, and so as to be enabled to stop or change the direction of his boat in the shortest time, or he might be required to lay her to, or anchor her, according to the danger or probability of encountering other vessels in motion. In such case, he could not discharge himself of all obligation to further care and watchfulness, by merely rendering the steamboat motionless. He would be bound to exercise every reasonable and appropriate means at his command to prevent other vessels running upon his, to warn them of his position

¹ Since reported, *Olcott*, 483.

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by ringing his bell, blowing off steam, or giving other notice that would be equally advantageous to them. The same principles must apply to the conduct of all vessels.

A sailing vessel at anchor, or lying-to in a dark night in a harbor, or where other vessels may be expected to pass, must show a light, or collisions with her will be imputed to that neglect. When the darkness is occasioned by mist or fog, and a light will not aid to designate her position, there would seem to devolve upon her the duty of using correspondent means, for instance, as was done by the schooner the night before the collision, to give notice by noises sufficient to reach other vessels nearing her.

If, then, the schooner, at the time of the collision, is to be regarded as on the ocean, and excused from giving warning to other vessels in that position, the steamer would be equally freed from her obligation to keep at a low speed, and would be entitled to run as on the high seas, and a collision between the two vessels, under such circumstances, would be a common misfortune and an accident, without blame to either party.

But, in my judgment, this is a case of clear fault in both parties. The schooner lying-to in a calm, and having heard the steamboat approaching her for fifteen minutes, and knowing she was not discoverable from her by sight, was bound to to give warning by such noises as might probably reach the steamer. She was not driven to devise something to that end in sudden alarm and confusion. She had passed the night in the use of the very precaution adapted to the occasion, and it was only necessary to repeat it on this emergency. Upon the evidence of the pilots and mates of the steamboat, that like noises were frequently heard by them in fogs, and the steamer was thus enabled to govern its course safely, it is fair to presume this accident might have been thus wholly prevented.

It was manifestly hazardous to run the steamboat in that

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state of the weather, when the darkness prevented her seeing any object more than a hundred yards ahead, and at a speed so great that with every exertion of her powerful engine she could not be stopped on the water in less than four or five minutes' time, during which her momentum must probably force her ahead a quarter or one third of a mile.

The doctrine commonly accepted and applied in this Court is, that the libellant cannot recover for a collision, if it appear to have been caused in any manner by his own misconduct or fault, although he shows the other vessel to have been in fault also. *The Emily*,¹ (*MSS.*) April, 1845; *Abbott on Shipp.* 303, note 1; and that the *rusticum judicium* recognized in many high authorities, which apportions the loss equally between both parties, (3 *Kent*, 231; *Abbott on Shipp.* 305,) applies only to cases where it is undiscoverable upon the proofs where the blame actually lies. This is, however, the first case which has occurred in this Court, where the question was distinctly propounded, whether in case of collision and loss of property by the mutual fault of both parties, the rule of contribution should be applied.

I confess myself better satisfied with the familiar doctrine of the common law, that in cases where both parties are to blame, no recovery of damages can be had by either. *Kent v. Elstop*, 3 *East*, 18; *Vanderplank v. Miller*, 1 *Mood. & M.* 169. The English Admiralty has, however, distinctly laid down the opposite rule, (*The Woodrop Sims*, 2 *Dods. R.* 83,) and that case has been constantly adhered to since. *Abbott on Shipp.* 230; *Story on Bailm.* § 608 *a*, note.

Judge Story regards it the settled law of modern maritime States, and he traces it to a high antiquity in the continental codes, (*Story on Bailm.* §§ 608, 610,) and it has been recognized in several American decisions of respectable character

¹ Since reported, *Olcott*, 132; decree affirmed, 1 *Blatchf. C. C. R.* 236.

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and weight. *Reeves v. The Constitution*, *Gilp.* 579; *Rogers v. The Brig Rival*, 9 *Law Rep.* 28; *The Scioto*, 11 *Law Rep.* 16; S. C. 5 *N. Y. Leg. Obs.* 442. The case of *Shroud v. Foster*, (1 *How.* 92,) admits, by implication, the existence and validity of the rule, although that point was not embraced within the decision; and in the case of *Waring v. Clarke*, (5 *How.* 503,) Mr. Justice Woodbury adverts to the rule of contribution between vessels, both of which were culpable, as one of the settled modes of exercising Admiralty jurisdiction in cases of collision. The question, what is the proper rule of damages in such cases, is one deserving the solemn adjudication of our highest tribunal; but until it may be finally settled there, I shall adopt the rule of apportionment indicated in the authorities cited, and shall, accordingly, decree that a valuation of the schooner and cargo be made, and that the libellants recover one half that value. No costs are to be taxed by either party against the other.

The ordinary order would be, that the loss of both parties from the collision be valued, and that the equal moiety be borne by each; but the decree may be more simple and direct in this case, as there is no proof that the steamer received any injury.

*Decree accordingly.*¹

¹ The case was appealed to the Circuit Court; (*The Steamboat Bay State*, 11 *N. Y. Leg. Obs.* 297;) where it was held, as in the District Court, that the steamer was shown to be in fault in her manner of navigating. But it was further held, that the proofs in the cause did not warrant the Court to say, that as matter of fact, there was a usage of blowing horns, &c., on board of sailing vessels becalmed in a fog, under which the schooner was bound to take such precautions in warning off the steamer. The decree was, therefore, reversed, as to the point that the schooner was herself in part to blame; and a decree ordered for the libellants for the full amount of their damages.

This reversal of the decision reported in our text, has been by some of the profession understood to proceed upon the ground, that as between a sailing vessel or steamer approaching in a fog, the whole duty of precaution to

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A charter-party, sounding wholly in covenant, contained agreements on the part of the owner that the vessel was fit for the voyage,—that she should take in a cargo to be furnished by the charterer, reserving her cabin and room for her crew, water, provisions, &c.,—that the privilege of putting on board steerage passengers should belong solely to the charterer, and that if the ship should be unable to carry cargo and passengers to the stipulated amount, there should be a reduction of freight. On the part of the charterer, it was agreed that he should furnish the cargo—should pay a stipulated freight and demurrage in case of delay in loading, &c.

Held, that this charter-party, construed under the presumption of law against a change of ownership, and in the light of the acts of the parties under it, was but an affreightment for the voyage, and not a letting of the entire ship, so as to constitute the charterer owner for the voyage.

Ships carrying passengers for hire stand upon the same footing in respect to their responsibility *in rem* for the performance of the passage contract, with those carrying merchandise on freight.

avoid collision rests upon the steamer, and the sailing vessel is free from obligation to employ any means or methods of giving notice of her proximity. We suggest, however, that the decision in the Circuit Court, fairly construed, goes no further than to hold that, as matter of fact, the evidence in the case showed that none of the precautions suggested as having been within the power of the sailing vessel—blowing horns, beating empty barrels, &c.—would have been of any practical avail in notifying the steamer of the danger; and so, that the sailing vessel was not to be held guilty of negligence in failing to employ means of notice, which, if employed, would in all probability have done no good. The general principle that a sailing vessel, aware of the approach of a steamer in darkness or fog, and having at command adequate means of giving notice of her proximity, is bound to use those means, does not seem to us to be impugned by the decision in the Circuit Court. She is not, however, it would seem, guilty of negligence in failing to use means, which it appears would be insufficient if used.

The decree of the Circuit Court was affirmed by the Supreme Court, in December, 1855, upon the grounds assigned in the Circuit Court. The case in the Supreme Court is reported under the title of *McCready v. Goldsmith*, 18 *How.* 89.

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Ships carrying passengers for hire are liable *in rem* for wrongful acts of the master in his capacity as such ; but not, *it seems*, for acts of mere personal private malice or ill-will.

Where a passenger is put on short allowance by the master, the latter will not be presumed to have acted from personal malice ; and if such short allowance be a violation of the passage contract, the ship will be held liable unless it is shown that the master's conduct was malicious and wrongful.

THIS was a libel *in rem*, by Peter McDonald, prosecuting for himself and on behalf of his wife and minor children, against the ship Aberfoyle, to recover damages for breach of a contract for the passage of libellant and his family.

Samuel R. Graves, owner of the vessel, filed a claim and answer. The cause came on for a hearing upon the merits, and was heard upon an agreed statement of facts, instead of on pleadings and proofs. The facts as stipulated were substantially as follows :—

The claimant, Samuel R. Graves, was, during December, 1846, and thereafter, the owner of the Aberfoyle. December 9, 1846, he executed a charter-party of the vessel to one William Quayle, of Liverpool, by which it was mutually agreed, amongst other things, that the vessel should take on board a cargo of general goods and merchandise, together with a full legal complement of steerage passengers, their luggage, water, provisions, fuel, &c. ; that being so loaded she should proceed to New York ; that the cargo should not exceed what she could reasonably stow and carry over and above her cabin and necessary room for her crew, water, tackle, apparel, provisions, and furniture ; that the charterer should load the vessel as aforesaid, and should pay freight to the owner, £485 ; that the privilege of putting on board steerage passengers should belong solely to the charterer ; the entire of the between decks, if required, being reserved for the accommodation of such passengers ; that the ship-owner should be satisfied for the payment of head-money. The charter-party contained no provision as to who should man and navigate the ship.

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After the making of this charter-party, but before the sailing of the vessel, William Quayle let to J. W. Shaw & Co., of Liverpool, the privilege of furnishing all the steerage passengers to be taken by the vessel on her voyage.

December 15, 1846, the libellant made a contract with J. W. Shaw & Co. for the passage of himself and family in the vessel to New York, for which he paid £22, in advance. By the terms of the passengers' contract ticket, executed by J. W. Shaw & Co. to the libellant, they agreed to provide the libellant and the members of his family with a steerage passage to New York, including space for luggage, head-money, &c., and to furnish them with water and provisions, as follows: seven pounds of bread, biscuit, flour, oat-meal or rice, &c., at least twice a week, and three quarts of water per day for each adult.

December 29, 1846, the vessel sailed with the libellant and his family on board, and carrying, also, about one hundred and sixty other passengers. For the first twenty-five days of the voyage three quarts of water and one pound of bread were given to each passenger daily, including the libellant and his family. At that time the passengers were put upon an allowance of two quarts of water per day, which continued three weeks; from that time only one quart of water a day was allowed them, which continued until March 9, 1847, at which time the vessel arrived in New York, making the length of her voyage sixty-nine days. For the last ten days before the ship arrived in port, the passengers were put upon an allowance of half a pound of bread a day; and during the voyage there was great suffering by all the passengers, including the libellant and his family, for want of bread and water.

The day before the sailing of the vessel, Wilson, her master, was taken sick, and one Thomas Jones was, by the owner, appointed master, and had command of the vessel during her voyage.

The claim of the libel was to recover \$500 damages.

William M. Allen, for libellant.

I. Upon the facts shown, the owner is liable to the libellant.

1. The charter-party is most clearly a charter of affreightment, sounding in covenant. In order to charge the charterer as owner for the voyage, he must have the exclusive possession, command, and navigation of the ship. *Abbott on Shipp.* 365, notes 1 and 2; 8 *Wheat.* 546; 18 *J. R.* 157; 4 *Cow.* 470; 3 *Kent*, 220; 6 *Pick.* 248; 1 *Cranch*, 214. The whole instrument must be taken and construed together, in order to determine its effect. 4 *Cow.* 470; 1 *Sumn.* 550. Here Quayle is described as merchant and freighter. There appears to be reserved the cabin of the vessel, and necessary room for her crew, water, tackle, apparel, provisions and furniture. If she is detained more than twelve working days by the charterer, he is to pay demurrage. He is to pay freight to the owner, £485; and the ship-owner is to be satisfied for payment of head-money for passengers. Moreover, the charter-party does not declare who shall man and navigate the ship. And it is a general rule that the owner is bound, notwithstanding a charter-party, to put the vessel in a suitable condition to perform her voyage, and to keep her in that condition during the voyage, and to victual and man her for the destined navigation, unless there is a contrary stipulation in the charter-party, or the nature and object of the charter-party devolve that duty upon the charterer. *Abbott on Shipp.* 323, note 1, and authorities there cited. This being the fact, it is submitted, that the case of *Parish v. Crawford*, (2 *Str.* 1251, cited in *Abbott on Shipp.* 53,) and subsequent cases, show the owner in this case to be liable. 2. The putting the libellants on short allowance was not only a breach of the contract, but it was a direct violation of the statute law of England, where the contract was made. 5 & 6 *Vict.* ch. 117, § 6. It was done by the master, who was under the direction of the owner. The

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common law of England and of this country, except so far as it has been altered by statute, follows the civil law, and holds the owners responsible for the acts of the master without distinction or limitation. *The Rebecca, Ware*, 188. The owner has a remedy against the master. 3. The case of *Chamberlain v. Chandler*, (3 *Mason*, 242,) shows, "that the contract for passengers is not for mere ship-room and personal existence on board, but for reasonable food, comforts, necessities, and kindness; that in respect to females, it proceeds yet further, and includes an implied stipulation against obscenity, immodesty, or any wanton disregard of their feelings; and that a course of conduct, oppressive and malicious in these particulars, is no less punishable in courts of justice than personal assaults. And they come within Admiralty cognizance. 4. The owner must be liable both upon the consideration of the benefit arising from the ship, which is the equitable motive, and also, as having the direction of the persons who navigate the vessel. Though he did not receive the freight which the passengers paid for their passage, yet he had the benefit of that freight in general, and thus had that equitable motive which renders him liable. The transactions between the owner and Quayle and Shaw & Co. consisted merely in giving them power to put goods and passengers on board. Again, Shaw & Co., in procuring passengers for the ship, acted in the capacity of agents for the owner, inasmuch as the ship was to furnish provisions and water, and not Shaw & Co. The owner was undoubtedly aware that such was the contract, and such the law where the contract was made, and he assumed the obligations thereby devolving upon him, in receiving the passengers on board and undertaking to convey them to New York. 5. It is conceded that the contract with the libellants to furnish them water and provisions was violated, and that they suffered greatly in consequence. There can be no wrong without a remedy. Now what is the rem-

edy of the libellants? Not against the captain, because he is not liable upon the contracts made by the owner. If not against the captain, it must be against the owner.

II. The libellants may proceed *in rem*. 1. It is an elementary principle, that there is no remedy without the means of enforcing it. How, then, are remedies on contracts enforced in this State? Is it not through the property of the delinquent? And can it make any material difference with him out of what portion of his property the claim is satisfied? It is conceded that the owner lives in Liverpool, in England; and to say that the libellants must return to Liverpool and prosecute a personal action, would be a denial of right. I take it to be law that when a tort, or any other action for which the owner is liable in Admiralty, has been committed, a proceeding *in rem* will be sustained. The *Rebecca, Ware*, 188. 2. The condition of the owner is not made worse by rendering the ship liable. It is immaterial to him whether the satisfaction for the injury is made from the ship or from his other property. But it is not a matter of equal indifference to the libellant, whether he is allowed or not to look to the ship for reparation, as this is not only his best, but will sometimes be found to be his only security.

III. This suit is sustainable upon the general principles upon which rest the decisions made in the following cases. *La Caux v. Eden*, *Doug.* 594; *St. Amand v. Lizardi*, 4 *La.* 243; *Manro v. Almeida*, 10 *Wheat.* 473; *Dean v. Augus, Bee's Adm. R.* 369.

R. Emmett, for the claimant.

I. The libel states this to be a cause of *ill-treatment and short allowance in water and provisions, civil and maritime*. The ill-treatment, if any, consists in the short allowance; none other is alleged. Short allowance of provisions, whether from failure of the owner to put them on board, or from the captain's wrongfully withholding them, does not make a cause *maritime*, though the failure to provide a *passage*, or the

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necessary accommodation on board to a passenger, might be of that character. A passage in a vessel does not, in law or by custom, imply the furnishing of provisions. Passengers frequently provide themselves, and this is a matter of *personal contract dehors* the *maritime* engagement, which can embrace the *passage* only.

II. The libel alleges an agreement under which the libellant and his family embarked as passengers, and by which a certain allowance of water and provisions was to be furnished to them; but as it avers no breach of contract by the owner, or any other party, and does not even state with whom such agreement was made, it is not a proceeding *ex contractu*.

III. The gravamen of the libel is, that the master *withheld from and refused to furnish* the water and provisions to the libellants, whereby they suffered great want, &c., and for which they *claim damages*. The charge of *withholding* implies that the water and provisions so withheld were actually on board, but *wrongfully* withheld. The proceeding in this case is, therefore, for an alleged *tort* by the master.

IV. If Courts of Admiralty have jurisdiction over torts committed by a master of a vessel against a passenger, such jurisdiction is *in personam*, not *in rem*. *De Lovio v. Boit*, 2 *Gall.* 472; *Chamberlain v. Chandler*, 3 *Mason*, 242. The torts of the master cannot hypothecate the ship, nor produce any lien on it. 2 *Browne's Civ. & Adm. Law*, 143.

V. This cause, on the face of the libel, presents an *action of damage*. In *actions of damage*, the process must necessarily be against *the person*. 2 *Browne's Civ. & Adm. Law*, 347.

VI. Torts cognizable in Admiralty are governed by the principles of the common law, and the remedy must be against the person who committed the tort.

VII. All claims *in rem*, not founded on actual contracts of hypothecation, rest on the following principles: That a service has been rendered *in rem*, as in the case of mariners'

wages, salvage, bottomry, freight; or, that an injury has been received *ab re*, as in case of collision of vessels at sea.

These principles entirely exclude proceedings *in rem* for torts. 2 *Browne's Civ. & Adm. Law*, 142, 143, 396, 397.

VIII. Though Admiralty may have jurisdiction of a contract with a passenger for his *mere passage* as a *maritime cause*, it can only be *in personam*, whether such contract be made by the owner himself or by the captain as his agent, because it does not come within any principle of a lien *in rem*, either of hypothecation, service to the ship, or legal liability imposed on or incurred by it.

IX. The facts of this case, as agreed upon in the written statement submitted to the Court, show:—

1. That if any fraud was committed on the passengers by not furnishing the vessel with a sufficient quantity of water and provisions, (which, however true it might be, is neither alleged in the libel nor shown,) the owner of the vessel, who now claims her, was no party to it. He made no contract whatever with the passengers, and had no control over any such contract or its performance by those with whom the passengers made it.

2. That the master was innocent of any connection with such a fraud, as it appears that he was only appointed the day before the vessel sailed, in consequence of the sudden sickness of her regular master. Also, that in reducing the allowance of water and provisions, the master could be guilty of no tort in a legal sense, however much the libellants may have suffered, because that course was pursued by him under circumstances of peril and necessity, for the preservation of all, including the libellants, and was, therefore, under the circumstances, a meritorious duty on his part.

In any view of this case, therefore, either as founded on tort or contract, the libel should be dismissed, and the vessel restored to the claimant, and costs awarded to him.

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BETTS, J. The contract proved in this case between the owner of the vessel and the charterer was a contract of affreightment for the voyage, and did not amount to such a letting of the entire ship as to constitute the charterer owner for the voyage. The rule of construction of a charter-party, in this respect, is stated by Mr. Abbott to be as follows:—"When, by the terms of the charter-party, the master and mariners are to continue subject to the orders of the ship-owner, he retaining through them the possession, management, and control of the vessel, it is to be considered as a contract to carry the freighter's goods; but where the merchant engages to pay a stipulated price to the ship-owner for the use of his ship, by the month or year,—takes it and them into his service,—receiving the freight actually earned by it to his own use, the master and mariners becoming subject to his orders, and the general management and control of them and of the vessel being given up to him,—it is a demise of the vessel with her crew for the voyage, or the term specified; the charterer becomes owner *pro hac vice*, entitled to the rights and subject to the responsibilities which attach to that character." *Abbott on Shipp.* 47–52, and notes.

The case of *Macardier v. The Chesapeake Insurance Company*, (8 *Cranch*, 39,) drew in question the construction in this respect of a charter-party of the following nature: One M'Dougal, the general owner of the brig Betsy, let her to the plaintiff by a charter-party of affreightment, excepting and reserving her cabin for the use of the master and mate, and for accommodation of passengers, as therein mentioned, and so much room in the hold as might be necessary for the mariners, and storage of water, wood, provisions, and cables, for a voyage from New York to Nantes; and M'Dougal, by the same instrument, covenanted to man, victual, and navigate the brig at his own charge during the voyage, and to receive on board and carry any shipment of goods made by the plaintiff. The passengers on board of the brig were to be

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at the joint expense of the parties, and the passage-money was to be equally divided between them. It was held, upon these facts, that M'Dougal remained the owner for the voyage, upon the general principle that, where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter-party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. (Citing *Hove v. Groveman*, 1 *Cranch*, 214.) And this conclusion, that the owner of the vessel, notwithstanding the charter, remained her owner for the voyage, was derived in part from the fact that he retained the exclusive possession, command, and management, of the vessel, and that she was navigated at his expense during the voyage,—and apart from the circumstance that the whole charter-party, except the introductory clause, “hath granted and to freight let,” was one sounding merely in covenant.

In the case of the schooner *Volunteer*, (1 *Sumn.* 556,) the same principles were applied to a case quite analogous to the present. The charter-party there, after naming the parties, proceeded to state that the owner, for the consideration thereafter mentioned, “has letten to freight the whole of the said schooner, with appurtenances to her belonging, except the cabin, which is reserved for the use of the master, and what room is necessary under deck for provisions, wood, water, and cables,” for a voyage specified. It further set forth covenants on the part of the owner and charterers respectively, among which were these:—that the owner should pay all and every charge of victualling and manning the schooner, during the voyage, and should furnish the schooner victualled and manned; and that the charterers should bear all other charges, and should pay a specified freight. It was held that, upon the construction of this instrument, the general owner remained unquestionably the owner for the voyage. Mr. Jus-

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tice Story remarked, "the vessel was equipped and manned and victualled by him, and at his expense, during the voyage; and he covenanted to take on board such goods during the voyage as the charterers should think proper. The whole arrangements on his part, in these respects, sound merely in covenant. It is true, that in another part of the instrument it is said, that he has 'letten to freight,' which may seem to import a present *demise* or *grant*, (and not a mere covenant,) of the whole schooner for the voyage. But this language is qualified by what succeeds. And the whole schooner is not let; for there is an express exception of the cabin, and certain portions of other room under deck. If the whole schooner, then, was not granted during the voyage on freight, how is it possible to contend that the libellant did not still remain owner for the voyage? The master was his master, appointed by him, and responsible to him; the crew were hired and paid by him; and the victualling and manning were at his expense. He also retained the exclusive possession of a part of the vessel for the voyage, and the control and navigation of her during the voyage. Taking, then, the whole instrument together, it seems wholly inconsistent with the manifest intent of the parties that the charterer should be owner for the voyage."

In a later case, also, decided by Mr. Justice Story, (*Certain Logs of Mahogany*, 2 *Sumn.* 589,) which arose upon a charter-party substantially analogous, as to all points important to the present discussion, to that drawn in question in *The Volunteer*, that learned jurist, commenting on a discrepancy between the English and American cases, thus restated the American rule: "If the absolute owner does not retain the possession, command, and control of the navigation of the ship during the voyage, and the master is deemed his agent, acting under his instructions for the voyage, though authorized and required to fulfil the terms of the charter-party, the absolute owner must, under such circumstances, be still deemed owner for the voyage, and be liable as such to all

persons who do not contract personally and exclusively with the charterer, by a sub-contract with the latter, knowing his rights and character under the charter-party." And it was further held in the same case, that wherever, upon comparing the various clauses of a charter-party, it remains doubtful whether the charterer was intended to have the sole possession and control of the vessel during the voyage, or to be constituted owner for the voyage, then the general owner must be deemed such; for his rights and authorities over the voyage must continue, unless displaced by some clear and determinate transfer of them.

Bearing in mind this presumption against any transfer of the ship to the charterer for the voyage, I proceed, in the light of the foregoing adjudications, to consider what construction is to be placed upon the charter-party proved in this case; and, at the outset, two distinctions may be noticed between the present case and those already cited. In each of the three cases just mentioned, stress was laid in the decision upon the circumstance that the charter-party was, for the most part, one sounding in covenant; but this was adverted to with the qualification that there were also clauses of a contrary import. There is no such cause of embarrassment in the terms of the instrument now before the Court. That instrument is one which rests entirely and unequivocally in covenant alone. It contains no words of grant or demise whatsoever. It commences, not by stating that the owner hath "let to freight" the vessel chartered, but by saying that "it is this day mutually agreed" that the ship shall take on board the cargo to be furnished by the charterer; and the remaining clauses of the instrument are not only clearly in the nature of mutual and reciprocal agreements, but are technically so expressed.

The second distinction between the present case and those which have been cited is, that the charter-party now before the Court contains no express provision binding the owner to man and navigate the ship during the voyage; a clause which was

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inserted in each of the charter-parties in the cases referred to. It was contended upon the argument, that the absence of this provision was immaterial, inasmuch as, by a general rule of law, it was said, the owner is bound, notwithstanding a charter-party, to put the vessel in a suitable condition to perform her voyage, and to keep her in that condition during the voyage; and to *victual and man her* for the destined navigation, unless there is a contrary stipulation in the charter-party, or the nature and object of the charter-party devolve that duty upon the charterer. This rule was stated by counsel on the authority of a note to *Abbott on Shipping*, (Story and Perkins's ed. 323.) The cases cited in that note probably support it so far as concerns the obligation of the owner to put her and keep her in suitable condition to perform the voyage. One only of those cases, however, (*Goodridge v. Lord*, 4 *Mass.* 483,) bears upon the question of the obligation to man the ship; and that case, so far from sustaining the rule contended for, holds directly the reverse. In that case, the owners of the vessel brought suit against the charterers to recover moneys in part paid in settlement of seamen's wages, for which they had libelled the ship. There was, in that case, in the charter-party, a stipulation binding the charterers to pay the charges of victualling and manning the vessel; but the Court remarked that an action would, under the circumstances, lie for the owners against the charterers to recover the amount paid, even without an express stipulation in the charter-party, or any proof that the charterers were to victual and man the ship; "for that would be the effect of the contract of charter-party, unless it appeared, by the instrument itself, that a different arrangement was intended." The absence of any provision in the agreement of charter-party requiring the owner to man and navigate the ship is, therefore, a circumstance not without weight, as an indication that the intention of the parties was to vest in the charterer the ownership of the vessel for the voyage. It is not conclusive

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upon the question of intention, however. That intention is to be inferred, not from a single clause of the instrument or a single fact in the case, but from the whole tenor of the charter-party throughout, construed in the light of all the facts proved, which may be admissible as explaining the intent and meaning of the contract. *The Volunteer*, 1 *Sumn.* 566; *Certain Logs of Mahogany*, 2 *Ib.* 589.

The question upon the point now under discussion may, therefore, be stated thus: Does this charter-party, read connectedly and as a whole, and with a proper reference to the circumstances under which it was executed, so clearly show an intent to vest in the charterer the ownership for the voyage, that the presumption of law in favor of the continuance of the general ownership is overcome? I think it clear that this question must be answered in the negative. The charter-party, as already noticed, sounds wholly in covenant. It describes Graves, the claimant, as "owner," and Quayle, the charterer, as "merchant and freighter." It identifies the vessel in part by the words "whereof Wilson is master;" Wilson being the master appointed by Graves before the chartering, and being, as is shown, in fact continued in that appointment until the day before the vessel sailed, when, in consequence of his sickness, a substitute was placed in command. The instrument contains agreements on the part of the owner that the vessel is tight, stanch, and strong, and every way fitted for the voyage; that she shall take on board a cargo to be furnished by the charterer, not exceeding what she can carry over and above her cabin and necessary room for her crew, water, tackle, apparel, provisions, and furniture; that the privilege of putting on board steerage passengers shall belong solely to the charterer, the entire of the between decks, if required, being reserved for such passengers; and that if the ship shall be unable to carry cargo and passengers to the stipulated amount, there shall be a proportionate reduction in the hire of the vessel. And on the part of the char-

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terer it is agreed that he shall furnish such a cargo as is contemplated; that he shall pay freight, £485, and demurrage, if more than twelve days are occupied in loading; and that the between-decks shall be calked, &c., at his expense. These provisions clearly indicate, upon the whole, the intention of the parties to retain in the owner the general ownership of the vessel, and to secure to the charterer only rights in the nature of affreightment. This construction is also confirmed by the conduct of the parties under the agreement. The facts are far from countervailing the presumption that no change of ownership was made. The remaining questions in the case are, therefore, to be considered on the basis of the general owner remaining owner for the voyage.

Ships carrying passengers on hire stand on the same footing of responsibility, in that respect, with those carrying merchandise on freight,—passage-money and freight being, in legal acceptation, equivalents. The liability of the vessel in specie, upon a contract of affreightment, is not varied by the circumstance that the contemplated subjects of transportation are passengers, instead of merchandise. A passage contract is, in respect to the vessel's liability, only a species of affreightment, in which the passengers constitute the cargo, and the passage-money answers to the freight. This principle was fully discussed in the late case of *The Zenobia*,¹ in this Court, in which the views of the Court, upon this subject, were stated at large.

The vessel is also liable *in rem* for merchandise laden on board by the charterers, (*The Rebecca, Ware*, 187; *Abbott on Shipp.* 47, 52,²) as well as upon contracts by the master or the agents of the owners in relation thereto. She is therefore liable *in rem* upon a contract to carry passengers, equally whether that contract is made with a charterer, or with the

¹ Reported *ante*, 80.

² See, also, *The Flash*, *ante*, 67.

master or owners, when the charter-party does not operate to render the charterer owner for the voyage; because, in that case, the charterer acts in the capacity of agent of the owner. She is liable for the conduct of the master as *master*, during the voyage; and for any ill treatment of the passengers by the master, in his capacity as such, a remedy may be had against the vessel herself. She may, indeed, not be liable for mere acts of personal malice or ill-will on the part of the master, not arising out of or connected with the exercise of his duties as master,¹ though for such acts there is clearly a personal remedy against the master himself. *Chamberlain v. Chandler*, 3 *Mason*, 242. If, therefore, it were made to appear that the treatment complained of in this case was prompted by personal malice and ill-will on the part of the master,—if the withholding of provisions and water had been a tortious act on the part of the master, springing from personal spite and vindictiveness, and disconnected from any such circumstance as a general lack of provisions on board, for which the owners might be responsible,—there would be ground for doubt whether the libellant was entitled to any other remedy than an action *in personam* against the master himself. But such conduct on the part of the master is not to be presumed. In this case, the answer does not aver that the ship had sufficient supplies; and there being no proof of that fact, the implication is, that she did not have them to serve out.

It was contended, on behalf of the claimant, that the contract to furnish provisions was not a maritime contract, but a mere matter of personal agreement, independent of the contract for passage, and that it therefore could not be enforced against the ship. There may, undoubtedly, be a contract for passage, in which the passenger undertakes to carry his own store of provisions. Where, however, the contract is not of

¹ See, also, *The Zenobia*, *ante*, 80, to the same effect.

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this description, but the maintenance of the passenger, during the voyage, is undertaken, as well as the transportation of his person, the ship is as much bound to supply wholesome and necessary provision and water, as to provide safe shelter and lodging.

There is no ground laid in the case for vindictive or punitive damages against the *owner* or ship. The agents of the owner *pro hac vice*, did not fulfil the implied obligation of the ship, and thus relieve her from performing it in this respect, and for that cause there was no ground for compelling the libellants to pay passage-money; and the libellants having paid it, are, because of such violation of the obligation by the ship, entitled to recover it back, the consideration on which it was advanced having failed.

*Decree accordingly, with costs.*¹

SCOTT v. RUSSELL.

For a seaman wilfully to do any act which puts the vessel in jeopardy,—*e. g.* for one to violate a notorious excise law by smuggling,—is a breach of the duty which he owes to the ship.

Such breach of duty may be considered in diminution or in bar of the seaman's wages; it being an offence in the nature of barratry, causing loss and delay to the vessel, for which he would justly be subject to make amends, by forfeiture or subtraction of wages.

THIS was a libel *in personam*, by John Scott, against William H. Russell, master of the ship Niagara, to recover for seamen's wages.

It appeared that the libellant, a resident of Liverpool, ship-

¹ This case was appealed to the Circuit Court, where the decree was affirmed on the general grounds taken in the District Court. See the report of the case, 1 *Blatchf. C. C. R.* 360.

ped, at the port of New York, on board the Niagara, as cook, for a voyage to Liverpool and back, and earned wages on the voyage. In defence it was shown, that while the vessel was yet in New York, he carried on board of her, clandestinely, a large package of tobacco, two feet long and ten inches wide, crowded full. It was also proved, that on the arrival of the ship in Liverpool, forty or fifty pounds of tobacco were found under the cook's caboose, crowded beneath the floor, and were there detected by the custom-house searchers, and the ship was in consequence detained for several days, under the provisions of the act 8 & 9 Victoria, which prohibits the smuggling of tobacco into the country under penalty of forfeiture of the vessel. No proof was given of the amount of loss incurred by the owner in consequence of this detention.

Alanson Nash, for the libellant.

I. There is no proof that the tobacco found under the galley at Liverpool was that brought on board at New York by the libellant; nor that the libellant was in any way interested or concerned in the tobacco found under the galley, or in placing it there.

II. There is no evidence that the master or owner suffered any damage on account of the finding the tobacco at Liverpool. There is no proof that any penalty was paid, nor any proof that the detention of the vessel was occasioned by the finding of the tobacco.

III. If it were proved that damage had been incurred in consequence of the conduct of the libellant, as contended, they could not be off-set in this cause. The damages suggested are only matter of off-set. The circumstances alleged do not constitute either a payment to the libellant or a forfeiture; or if they were a forfeiture, it could only apply to wages antecedently earned, and could not operate as a prospective punishment. *Clockman v. Tunison*, 1 *Sumn.* 373; *The Rowena, Ware*, 307; *Abbott on Shipp.* 767.

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Burr & Benedict, for the respondent.

I. The fraudulent misconduct of the libellant forfeited his wages.

II. The damages sustained in this case may be set-off against the wages. *Millard v. Dorr*, 3 *Mason*, 161; *Abbott on Shipp.* 653, note; *Gilp.* 89.

BETTS, J. It is sufficiently proved that the libellant clandestinely carried on board the vessel in New York a considerable quantity of tobacco, and that, immediately on the arrival of the vessel in Liverpool, a very similar quantity was found secreted under the caboose occupied by him as cook. This is, I think, sufficient evidence that he took on board the tobacco there detected, and that his misconduct caused the arrest of the vessel. If it were the fact, as suggested by counsel, that there were two distinct parcels of tobacco discovered, it would not have been difficult for the libellant to have produced evidence tending to show what disposal was made by him of the portion which it is amply proved he carried on board. In the absence of any evidence of that character, it is fair to presume that the parcels were the same; especially as the place of concealment was peculiarly accessible to the libellant.

For a seaman wilfully to commit an act of dishonesty or fraud, which exposes the vessel to jeopardy, is a breach of the duty and fidelity which he owes to the ship. Such act amounts to barratry, (3 *Durnf. & E.* 277; 2 *Cai.* 222; *Weskett on Ins.*, tit. *Barratry*.) and may be considered in diminution or in bar of his wages. *Curtis on Merch. Seam.* 118.

The wrong may be used by the ship-owner to countervail the seaman's suit for wages, without resorting to a cross-action to that end. The libellant, if not a British subject, was shipped in a British port, and must be presumed cognizant of a law so notorious as that smuggling tobacco into Great Brit-

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ain subjects the vessel to the danger of confiscation. Carrying the tobacco on board clandestinely, and keeping it closely concealed in port, imports his consciousness that the act was unlawful. His conduct must, therefore, be regarded as a gross violation of duty, attended with expense and delay to the ship, for which it is proper to impose a subtraction of wages by way of correction and amends.

As, however, the respondent has not proved the amount of loss occasioned to the ship by the misconduct of the libellant, (though estimates are given which import that it must have greatly exceeded the whole amount of wages earned,) the Court is disposed to abate the wages only in part, and with a view to operate as a proper check to seamen, rather than to recompense the owner in this case. The decree will therefore be, that the libellant recover the wages due him on the voyage out and back, but without costs as against the respondent, and with a deduction of \$25 for his unfaithful conduct and breach of duty in attempting to smuggle tobacco in the ship on the voyage.

Decree accordingly.

ALEXANDER v. GALLOWAY.

The theft of a portion of a cargo, by a mariner, works an absolute forfeiture of wages.

The fact that the seaman has been acquitted on a criminal trial for the larceny of a part of the cargo, is not conclusive to rebut the charge when set up as a defence against his suit for wages.

THIS was a libel *in personam*, by William Alexander against Joseph Galloway, master of the ship Columbia, to recover seamen's wages.

On the hearing of this cause, the libellant having proved his employment on board of the Columbia by the respondent,

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and the earning of wages, as alleged in the libel, the respondent put in evidence tending very strongly to show that, on the arrival of the *Columbia* at this port, the libellant stole from the cargo, with connivance of the second mate, a bale of cotton, which he took on shore for sale. This act was relied upon by the defence as a forfeiture of wages.

To rebut this defence, the libellant introduced the record of his trial and acquittal in the New York Court of Sessions on the charge of the alleged larceny.

J. Murrough, for libellant.

Burr & Benedict, for respondent.

BETTS, J. The defence establishes a case of unqualified plunder and purloining of a part of the cargo by the libellant on the arrival of the ship in this port; and the circumstances afford strong reason to believe that the theft was committed with deliberation, and in pursuance of a pre-considered arrangement.

Such gross dereliction of duty to the ship completely annihilates all claim to wages, without regard to the value of the property stolen. *Cons. del Mare*, ch. 167, 173. The mere embezzlement of cargo, or the improper use of it, or the doing an injury to it through fraud or negligence, is cause of forfeiture of wages, although it is ordinarily visited only by an abatement of wages to the amount of the ship's loss. *Mason v. The Ship Blaireau*, 2 *Cranch*, 267; *Abbott on Shipp.* 652.¹ But a case of premeditated thieving draws after it the forfeiture of all wages due the mariner upon the voyage. This penalty is no more severe than is appropriate to the offence. The wrong is one for which the master would be fully justified in discharging the seaman from the ship during the voyage; and offences of that class may always carry with them a forfeiture of wages. *Abbott on Shipp.* 652.

Libel dismissed with costs.

¹ See, also, the case of *Scott v. Russell*, *ante*, 258.

The Infanta.

THE INFANTA.

When a lien is claimed for labor and materials furnished in fitting out a vessel for sea, the Admiralty Courts of the United States observe the *lex loci contractus*, and grant or refuse the remedy sought, according as it is allowed or denied by that law.

Where a sworn answer is not demanded by the libel, the libellant may contradict its allegations, by proofs, without filing a replication thereto, or notice of such proof.

The testimony of witnesses may be taken on a commission sent abroad, whose names are not inserted in it, on satisfactory proof furnished after its return that their names or materiality were unknown when the commission was sued out or transmitted.

The Admiralty Courts of the United States will decline jurisdiction of controversies arising between foreign masters and crews, unless the voyage has been broken up or the seamen unlawfully discharged.

It is expected that a foreign seaman, seeking to prosecute an action of this description in the courts of this country, will procure the official sanction of the commercial or political representative of the country to which he belongs; or that good reasons will be shown for allowing his suit in the absence of such approval.

The testimony of the master of a foreign vessel that he had discharged a seaman in this port, will not be allowed in a suit by the seaman, in this Court, against the vessel for wages, to countervail his official report to the consul of his nation, that the seaman deserted the ship.

Two libels *in rem* were filed against the bark Infanta—the one by Robert Wood, the other by George States—both to recover wages. The facts in each cause being nearly the same, the causes were heard and decided together.

The bark Infanta was built in Nova Scotia, by a British subject resident in that province; and prior to the commencement of these actions was sold and transferred by her builder to John S. De Wolf, a British subject, resident in Liverpool, England; who was the claimant in these suits.

The libellant Wood shipped as first mate on board the bark, at Parrsborough, in Nova Scotia, on April 29, 1847. States shipped as mariner, at the same place, on the 26th of

The *Infanta*.

May following. The shipping contract was for a voyage to New York, and from thence to Liverpool, Great Britain, and back to a port in the United States or British America.

Both libellants alleged that they were discharged from the bark at New York. The answer admitted the discharge of the libellant Wood, but denied the discharge of States, and averred that he deserted the vessel, and that his wages had been paid him in full. The answer in each cause, also, imputed a fraudulent collusion between the master of the vessel and the libellants with intent to charge the vessel with unjust demands, and to exaggerate the amount of wages due to the libellant.

By a schedule attached to his libel, the libellant Wood stated his claim, as follows:¹

Wages under the shipping articles,	\$40.43
Wages as mate, while fitting the bark for sea, from Jan. 12 to April, 1847, 3½ months, at £5 per month,	77.70
Cr. by cash,	\$40.43
Balance claimed,	77.70
	<hr/>
	\$118.13 \$118.13

By a like schedule annexed to the libel of States, his claim was thus stated:—

For wages, as carpenter, &c., on the vessel, from Nov., 1846, to May, 1847, 66 days, at \$1.50 per day,	\$99.00
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¹ It will be noticed that there are discrepancies in the statement of Wood's claim, given above. The computation was so presented in the pleadings, and we give it as it there appeared. The inconsistency has no bearing on the question discussed in the cause.

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Wages, as mariner, from May 17 to July 17,		
1847, two months, at \$18 per month	.	\$36.00
Cr. by cash,	.	\$20.00
Balance demanded,	.	115.00
		<hr/>
		\$135.00 \$135.00

Other facts are stated in the opinion of the Court.

W. Wordsworth, for the libellants.

Francis Griffin, for the claimant.

BETTS, J. The libels article upon services rendered by the libellants anterior to the shipping agreement, and charge that they form liens upon the vessel to be enforced in this Court. The answers deny the indebtedness, and also assert that if it exists, it is in both instances the personal debt of May, the master of the vessel, who, it is alleged, furnished the work of fitting up the vessel under contract with the owner. Each answer, also, excepts to the jurisdiction of the Court on the subject-matter. Voluminous proofs have been taken on these issues.

The competency of the evidence offered by the libellants is denied on the part of the claimant, on the ground that no replications were filed to the answers; nor did the libellants give the notice, in writing, allowed by the practice of the Court to be given in place of a replication, that they would take testimony in contradiction of the answers. So, also, the admissibility of the testimony of several witnesses taken on a commission to Nova Scotia, is excepted to by the libellants, because the names of those witnesses were not furnished them previous to the examination.

Neither objection is maintainable. The libels do not demand the answer of the claimant under oath. Rule 87 of the District Court declares, that "an answer need not be put in under oath, unless so required by a sworn libel." Both

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answers, in these cases, were put in without attestation by oath. Rule 88 dispenses with a replication or written notice in all cases except those in which the libellant intends to offer proof in opposition to the allegations of a sworn answer. Accordingly the libels and answers are before the Court merely as pleadings, forming issues between the parties, and open to the same proceedings as if the answers had been sworn to and replications filed.

It is satisfactorily proved, on the part of the claimant, that the names of the witnesses referred to, or the importance of their evidence, were not discovered by the claimant until the commission was put in execution abroad, and in such case the testimony may be taken without previous designation of the witnesses to the opposite party. Rules 42 and 49 of the Circuit Court supply authority for executing the commission in the manner pursued in this case, and those rules regulate concurrently the practice of this Court. *Dist. Ct. Rules*, 240.

Although these cases must be disposed of on other and general principles, governing actions of this character in the courts of the United States, yet in view of the great labor and expense incurred by the parties in taking these proofs, and with the desire of acquainting myself fully with the merits of the case,—supposing that a suggestion from the Court in behalf of the libellants, if they have succeeded in establishing meritorious claims against the vessel, might conduce to an adjustment between the parties, and spare further litigation,—I have taken the pains to go over the evidence in full. A careful examination of the proofs discloses no reason why the Court should not apply to these causes the rules which deny jurisdiction to enforce *in rem*, payment for services rendered to a foreign vessel in her home port, and authorize the Court to decline jurisdiction of an ordinary suit for wages, prosecuted between foreigners, for services in a foreign vessel.

First, as to the claim to a lien for the services performed on the vessel while in Nova Scotia. The rendering of these

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services by each of the libellants was a transaction in a British port and between British subjects. Each contract for those services, whether direct or implied, had its origin within that jurisdiction, and was manifestly intended to be there performed upon both sides. The first element in the claim of a privilege in such debts, attaching them to the body of the vessel, is this: indisputable evidence that the debt had that operation and privilege under the laws of the place where it was contracted. In England, such a debt as is shown in this case would have no privilege, nor could Admiralty Courts take cognizance of it. *Abbott on Shipp.* 143. The act of 3 & 4 Victoria, c. 65, § 6, extending the jurisdiction of the Admiralty, applies in respect to necessaries furnished, only to foreign vessels. The law in the Provinces stands upon the same footing as in the mother country, in respect to the rights and liabilities of ship-owners. *The United States v. The Ship Recorder*, 5 *N. Y. Leg. Obs.* 286. This Court originates no right in respect to debts or contracts which did not accompany their inception. It administers the general maritime law, but will never, in controversies wholly of foreign origin, and between citizens and subjects of the same foreign country, give to either a hypothecation or privilege which he would not have possessed in the home and common jurisdiction. The lien is regarded as being, in effect, an element of the original contract itself and inherent therein. *The Brig Nestor*, 1 *Sumn.* 73; *Read v. The Hull of a New Brig*, 1 *Story*, 244; *The St. Jago de Cuba*, 9 *Wheat.* 409.

Courts of general jurisdiction, and proceeding according to the course of the common law, are governed by somewhat different considerations. They give their own remedy in every case suable before them, and it in no way affects their jurisdiction in the matter, that the suitor was not entitled to a like remedy, or indeed to any, in the place of the contract. But the Admiralty Courts of the United States restrict themselves in this respect. They will not entertain

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jurisdiction *in rem* over cases which, in the place of their origin, would not be entitled to that relief. The General Smith, 4 *Wheat.* 438; Peyroux *v.* Howard, 7 *Pet.* 324; The Schooner Marion, 1 *Story*, 68; Read *v.* The Hull of a New Brig, *Ib.* 244; The Brig Nestor, 1 *Sumn.* 73. And as they would not permit the citizens of a State which denies a lien upon its domestic vessels for repairs and supplies, to pursue a vessel into another State allowing such a remedy against its vessels, and to enforce it there, so, for more cogent reasons, in respect to the subjects and ships of a foreign country, a privilege denied them at home would be refused here.

Independent of these legal objections to the actions, the cases could not, I think, be sustained upon the proofs before me, if the claims had originated in this State, or in favor of citizens of a different nation and of different residence from the owners of the vessel.

Second, as to the claim for wages. A suit for wages between parties circumstanced as those now before the Court, cannot be sustained. The ship is still on her voyage, and bound from this port to one of the ports of Great Britain. There is no proof that these libellants were forcibly discharged from her. They should, accordingly, have accompanied her to a home forum, and there pursued their rights. This Court has repeatedly discountenanced actions by foreign seamen against foreign vessels not terminating their voyages at this port, as being calculated to embarrass commercial transactions and relations between this country and others in friendly relations with it.¹

It is expected that a foreign seaman seeking to prosecute an action of this description in the courts of this country, will

¹ See, also, Davis *v.* Leslie, *ante*, 123, where the grounds upon which the jurisdiction in these cases rests, and the limits within which it will be exercised, are fully stated.

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procure the official sanction of the commercial or political representative of the country to which he belongs; or that good reason will be shown for allowing his suit in the absence of such approval.

Upon the libel of Wood, however, it appears that he gives a credit to the exact amount of his wages, and upon the shipping articles there is endorsed the certificate of the British Vice-Consul at this port, "that the master has, with his sanction, discharged and paid off Robert Wood, the first mate," dated July 3, 1847. If this evidence does not conclude Wood in any court, it, at all events, affords satisfactory reasons to this Court for declining cognizance of the matter, and for remitting him to the tribunals of his own country, where the validity and effect of these official transactions may be properly investigated and determined.

On the same day, the Vice-Consul certified in the articles, that the master "reports the desertion of George States and other seamen." Any court would receive with great distrust any document or deposition of the master, attempting to set up his free discharge of States from the ship, anterior to such official report that the seaman had deserted. It certainly presents a case more pertinent to the jurisdiction of the British Courts, which can more appropriately measure the acts of the official agent of their government, and determine the rights of their own subjects, than can a foreign though friendly tribunal, which might fail of setting a just appreciation upon the polity of her laws of navigation and trade, and might thus unintentionally counteract important public interests in attempting to adjudicate upon the individual demands of her subjects.

Upon these considerations, I shall dismiss both these libels; and to protect the vessel and her master in the ports of the United States against a repetition of these suits, a decree for costs will be ordered against the libellants.

Decree accordingly.

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THE MARY ANN.

It seems that seamen employed on board a vessel forfeited under the act of 1800, (2 U. S. Stats. 70,) as fitted out for the slave-trade, are entitled to wages, notwithstanding the forfeiture, if they were not knowingly or willingly connected with the criminal purpose of the voyage.

Seamen are authorized under the general maritime law to prevent or restrain their officers from the commission of open and flagrant crimes in the ship, attempted in the presence of the seamen.

But the crew are not justified, by circumstances affording reasonable ground of suspicion merely that the master is about to engage the vessel in the slave-trade, in taking possession of her at sea, or in a foreign port, and bringing her back to her home port; and their undertaking so to do, forfeits both the wages already earned and those for the residue of the voyage.

The right of seamen to leave the vessel on the ground of her being chartered for a voyage in gross deviation from that for which they shipped, will not justify them in taking possession of the vessel while at sea.

Costs of a suit for seamen's wages imposed on libellants, where the crew had taken possession of the vessel while on her voyage and brought her home, under reasonable grounds of suspicion that she was to be engaged in the slave-trade.

A LIBEL *in rem* was filed by James States, William Gray, Edward Davis, Thomas Holden, and Peter Johnson, crew of the schooner Mary Ann, against that vessel, to recover wages. There was also filed a libel *in personam*, by Peter Johnson alone, against William F. Martin, the owner of the schooner, to recover the same wages as were claimed by the libellants in the other suit.

The facts in the case were, in brief, that the crew shipped on board the Mary Ann for a voyage to the coast of Africa. Arriving there, they became suspicious that the master intended to engage the vessel in the slave-trade. Resolving to prevent this, they took possession of the vessel, and after navigating her along the coast, in search of an American cruiser, under whose authority they might place her, but without success, they brought her back to the port of New York.

Proceedings were taken in this Court by the United States

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authorities, to procure the condemnation of the vessel as a slaver. The Court decided that, upon the whole evidence, the charge was not sustained, but that there was probable cause for her arrest.

The seamen having filed their libels, the causes were now argued upon the facts disclosed on the trial of the vessel. These are stated in detail in the opinion of the Court.

The counsel in the personal action were :—

Burr, Benedict & Beebe, for the libellant.

J. M. Smith, Jr., for the respondent.

The counsel in the action against the schooner, were :—

William Jay Haskett, for the libellant.

J. M. Smith, Jr., for the claimants.

BETTS, J. These causes are connected in the argument with that of the United States against the same vessel, the final decree in which was rendered a few days since. The proofs presented in that cause form the basis of proceedings in the two cases under consideration.

The actions are by the crew of the vessel jointly against the schooner *in rem*, and by one of them separately against her owner *in personam*, to recover wages for the entire voyage to the coast of Africa and back to this port.

The schooner, on her return to this port, was delivered to the United States authorities, by the libellants, and was arrested upon a libel of information, in the name of the United States, charged with having been fitted out for the purpose of carrying on a traffic in slaves from one foreign country to another. Her forfeiture for that cause was demanded under the provisions of the act of Congress of May 10, 1800, (2 U. S. Stats. 70,) the offence being held by the Supreme Court to be embraced in the act of fitting out and preparing the vessel, with intent that she should be so engaged, although not actually employed in the business. *The United States v. Morris*, 14 Pet. 464.

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Immediately on the seizure of the vessel by the United States, the seamen filed their joint libel against her for wages. This was on December 12, 1847; and on the 20th of the same month, the libellant Johnson commenced his separate action for the same cause against the respondent as owner.

The Court decided, in the suit brought by the United States, that upon the whole evidence the libel was not sustained, and decreed the surrender of the vessel to her owner, but held that probable cause for her arrest on the charge preferred against her, had been established.

Had the prosecution on the part of the United States resulted in the condemnation of the vessel, the seamen would have been entitled to their wages notwithstanding the forfeiture, if it appeared that they were not knowingly or willingly connected with the criminal voyage. The case of the *St. Jago de Cuba*; (9 *Wheat*. 417,) is directly in point to substantiate this principle.

The peculiarity of this case is, that the vessel was not condemned, nor was she brought in or diverted from her voyage by capture under authority of the United States. The seizers, if they may be so called, are not those who claimed the condemnation of the vessel for a violation of the acts in relation to the slave-trade, but they are the seamen composing her crew, who brought her off the coast of Africa clandestinely, and navigated her to this port, under apprehension that the master was about to employ the vessel and themselves in carrying slaves from Africa to Brazil.

The conduct of the crew is insisted, by their counsel, to have been justifiable and meritorious, because they acted *bonâ fide* under circumstances affording reasonable cause to believe that the master intended to engage the vessel immediately in the slave-trade, and in the full belief, on their part, that such was the fact. They accordingly had the right to withdraw themselves from connection with such a criminal enterprise, and did no more nor less than their duty in also

saving to the owner his vessel, by putting it out of the power of the master to employ her in that felonious pursuit.

It is just to the crew to remark, in vindication of their good faith in the transaction, that they did not, under the influence of their alarm and apprehension, take the schooner immediately to the United States, but they honestly sought along the coast an American cruiser, in order to put themselves and the vessel under the protection and authority of the American flag, and to take the advice of an American officer in the emergency.

It is manifest, however, that though they might rightfully, under the circumstances, appeal to an American officer, the failure to find one could not be regarded as clothing them with an authority to act as they supposed he might have done in view of the facts. The interference with merchant vessels, by seizing them or altering their destination or employment, by *public officers* of high intelligence and responsibility, and free from personal bias or apprehension in the matter, is a most delicate power, the exercise of which is, by all free governments, placed under careful supervision and guarded by appropriate checks. No considerate jurisprudence would entrust such powers to common sailors, and permit them to act as umpire between the master and the owner, or the owner and the government. Nor would they on any account be authorized to assume the command of the vessel, or break up her voyage, or leave her master in a foreign port, on suspicion that the vessel was designed for illegal traffic, or even for a piratical expedition. Seamen are not a class of men whose prudence or discretion could be trusted with the exercise of such delicate and extraordinary powers. The utmost that has been allowed the crew by modern or ancient maritime codes is, to interpose by force, and restrain and prevent the officers in command from committing open and flagrant crimes in their presence, or through their agency. In such extreme case, they may refuse to obey an unlawful

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order, or even arrest and confine the officer who attempts to perpetrate a piracy or felony. *The United States v. Thompson*, 1 *Sumn.* 172.

On this occasion, the crew, upon consultation, united in the determination to put or leave the master on shore, and carry off the vessel and endeavor to deliver her up to some American man-of-war upon the coast. Let it be admitted that a train of circumstances existed and had come to the knowledge of the crew, which afforded reasonable ground to suspect that the master contemplated employing the vessel in the transportation of slaves from Africa to Brazil, and that the liberty or lives of these men might become implicated by that attempt; still no act of guilt had been committed or avowed in their presence, nor do they show that an immediate interposition by them was necessary, or that abandoning the master on the coast, and going off with the vessel, was requisite for their protection and safety, or that that course was adopted to secure the rights of the owner, supposing that he was ignorant of the wrongful purpose of the master.

The vessel lay close into Gallinas, a place of resort for American, English, and French cruisers stationed on the coast to detect and prevent the prosecution of the slave-trade. An English vessel of war was then at anchor directly in the vicinity of the schooner, and if the crew could not find safe shelter on shore, they could at once have placed the ship and themselves under the guard of that ship, and there is no reason to doubt that on application to the British commander, and showing him probable cause for the proceeding, he would have extended his protection to them until some proper American authority could be communicated with. No imminent necessity accordingly is found for taking off the schooner by the libellants, even if it had been placed beyond question that she intended to take on board a slave cargo the next day. It is not shown that the libellants applied to the English vessel for protection; and that their flight was regarded

as needless and suspicious by the commander of that ship, would appear from his sending his cutter, at the request of the captain of the schooner, in pursuit of her, to bring her back to Gallinas by force.

I do not, however, determine this point on the supposition that the libellants gave way to a groundless alarm. Admitting that there was probable foundation for their fears, there is no sound and safe principle of the maritime law which justifies their extraordinary determination to remove the schooner from her moorings, and the still more reprehensible one of breaking up her voyage and running her across the Atlantic to the United States, in charge of men of no known capacity for such an undertaking. She would lose the protection of her insurance; and the peril of actual loss of the vessel, on a voyage so conducted, would scarcely be less than that of abandoning her on the coast to enter upon a piratical trade. The subjection of the vessel and cargo to the arbitrament of the crew, as to the legality or propriety of such an adventure, would expose distant mercantile operations to uncertainties and perils of the most appalling character; and it can never be expected that the right of a crew to interfere at their discretion, and take forcible possession of a vessel on mere circumstances of suspicion against the master, can be countenanced by the Courts as a general principle of law. Their interposition to that end must always be limited to extreme cases, where the facts are palpable, and leave no room to doubt that such interference had become indispensable to the safety of their own lives, or at least to avert the commission of some heinous crime.

The case then demands, not only that the conduct of the crew in running off with the vessel and bringing her to the United States should be pronounced excusable under the circumstances, but that it be held meritorious to such a degree as to entitle them to maintain an action *in rem* against the vessel, or *in personam* against the owner, to enforce payment

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of full wages during the whole period that she was so controlled by them and diverted from her voyage. This claim must be pronounced incompatible with every sound and safe principle of law.

* If this branch of the case cannot be supported, it is contended that there is an equity in behalf of the crew, sanctioning their claim to wages on the outward voyage. That was faithfully performed, and the cargo safely landed at Gallinas.

This demand is supposed to be sustainable on either of two grounds :—First, that the crew have given sufficient evidence that the vessel had deviated from her voyage, and was about to be employed in the slave-trade, to justify them in abandoning her service ; Second, that the act of the master in chartering her from Gallinas to Bahia, was a deviation which released the crew from their contract, and empowered them to recover wages for the services already rendered.

1. The conduct of the master, at Gallinas, wore a very mysterious and suspicious appearance. The voyage stated upon the shipping articles was “from New York to one or more ports on the coast of Africa, and back to her port of discharge, in the United States.” The evidence, on the part of the owner, showed that the voyage was intended for purposes of traffic up and down the coast, according to the usage of the trade on the western coast of Africa. The period that it was to continue was not stipulated in the agreement, or stated in his letter of instructions ; and without admitting that this omission imported an understanding between the owner and master, that the latter was expected to do something else with the vessel than to run her upon the voyage proposed, there is no question that, if he protracted the services of the seamen along the coast to an unreasonable extent, they might, for that cause, leave the vessel at a suitable time and place. *Abbott on Shipp.* 608 ; *The Crusader*, 1 *Ware*, 437. The crew were not under his absolute power as to the direction of their services ; much less could this indefi-

niteness as to the continuance of their engagement be used by the master to put them on a service wholly foreign to that agreed upon; and it would be, moreover, occasion for serious distrust as to his purposes, on their part. The chartering the vessel by the master to transport passengers to Bahia, without consulting his crew, and without stipulation as to the period she was to be employed on her destination after the charter-party should expire, taken in connection with the preparations before ordered by him on board of the vessel, and the notorious courses employed in carrying on the slave-trade, were all calculated to awaken their alarm. Had the men refused to perform that voyage, or left the ship to avoid being forced to make it, the Court would, without doubt, have held that the circumstances fully excused the act, and that they were entitled to wages to that period.

2. Whatever question might be raised upon the first point, it is, however, most clear that they had a right to abandon the vessel, on the ground of her being chartered for a voyage in manifest and unreasonable deviation from that for which they shipped. The law on this point is precise and well settled. Cases to the point are collected, and the principles well stated in the elementary books. *Curtis on Merch. Seam.* 24, 25; *Abbott on Shipp.* 173, note 1.

But these doctrines, looking to the protection and indemnity of seamen in vindicating their rights under the shipping contract, give no countenance to the inference now sought to be deduced from them, that a crew may exercise that right of withdrawing from the contract, by also taking away with them the vessel in which they engaged to serve. Such a consequence has no legitimate connection with the right itself, or the means necessary to its exercise. It is a naked aggression upon the rights of the owner—certainly no less when committed in port, where the men could find protection from coercion and personal violence, than at sea—and it will hardly be claimed that a crew may arrest the master and ship

at sea, and take command of her, to avoid a deviation from the voyage contracted. The authorities justify them in refusing, when in port, to perform service or remain on board after the vessel has deviated from her voyage, (*The United States v. Mathews*, 2 *Sumn.* 470,) but in no case is it intimated that they have the power to redress themselves for a past deviation, or to prevent an anticipated one, by seizing the vessel abroad and carrying her back to her home port.

This act of the crew was illegal. In an action by the owner against them for compensation because of the loss and injury occasioned to him thereby, they could not defend themselves on a plea of necessity, or on the ground of prudent precaution. They were entitled to leave the ship and abandon their engagement, or to defend themselves, in the harbor, from any attempt by force to compel them to go on the voyage to Brazil. Their privilege extended no further; and if, instead of furnishing grounds for strongly suspecting that the master was preparing to pervert the shipping engagement into a slave voyage, they had proved the fact explicitly, they would have no right in such case to do more than abandon the vessel. The ignorance and inexperience of the men, the suggestions made to them by others exciting or increasing their apprehensions, and the peculiar situation in which they were placed, tend to exonerate them from all mutinous or improper motives in what was done. They no doubt thought they were acting for the best interests of the owner, and in maintenance of the laws of their country; but most clearly these matters were not within their competency to determine, and in a civil action it is no justification for an illegal act that the party committed it with rightful and commendable intentions.

If fully persuaded that the libellants acted from worthy motives, and in the belief that what they did was for the benefit of the owner, yet the Court could not countenance so glaring a dereliction of duty on the part of sailors, by per-

mitting them to recover wages against the ship or owner, on facts and circumstances such as are disclosed in this case. If there was reasonable ground to apprehend danger to themselves, personally, in remaining on board and remonstrating with the master against his proposed voyage, and refusing to perform it, it was their duty to leave the vessel; and on such a termination of the engagement they would have recovered, certainly, the wages earned on the outward voyage, and probably, also, satisfaction for the return voyage thus lost. By absconding with the vessel and bringing her to the United States, from the coast of Africa, they have been guilty of a violation of their duty to the ship and to the owner, and deprived themselves of all rightful claim to wages for any portion of the time they were connected with her.

The libellants having been each examined as a witness in the cause, have had the opportunity of disclosing every fact and circumstance within their personal knowledge conducing to prove a guilty purpose on the part of the master of the vessel, or in excuse or extenuation of their imputations against him, and of their own conduct. They were not able, however, to present particulars which, reasonably considered, could establish the criminality of the master's conduct, or justify the determination adopted by them, and the means they took to carry it into effect.

Yet, upon the consideration that they acted under the influence of terror, and not from insubordination or dishonest motives, I should feel inclined to regard that state of excitement as so far palliating the conduct of the seamen as to warrant a decree leaving them to pay their own costs alone, without further punishing them, by imposing on them the costs of the owners; and if they possessed means which could be appropriated by the process of the Court to the satisfaction of the costs created under these prosecutions, I should forbear giving authority to use it against them.

It is manifest that there is no equity in the case justifying

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the Court in imposing costs upon the owner, who has sustained wrong and serious loss by the proceeding of the crew, and that the costs created in their behalf, in their own suit, must justly fall upon them. Their proctors, moreover, would derive no relief from a decree which only exonerated the libellants from paying costs to the claimant and respondent; and there being no sureties to protect it, it becomes, in the disposition of final costs, merely a naked question of equity between the seamen and the owner. The judgment of the Court upon the merits has determined that the owner was clear of all culpability in the matter, and that there was not proof sufficient to fasten guilt upon the master. It results, that the right of the suit is on the part of the owner, and the mistake and the wrong on the part of the sailors, and that accordingly they should be subjected to bear at least their own costs.

Independent of that consideration, it seems to me that the owner can properly claim the award of costs against the libellants, as a protection and immunity against subsequent suits on their part. It is by no means clear that a decree merely dismissing the libel would bar after actions by any of these parties; but if there is connected with the order an award to the owner of his costs of suit, there would be a positive judgment for the amount rendered against them, and no tribunal would permit the cause of action to be again litigated until that judgment was satisfied.

I shall, therefore, decree, that the action *in rem* and that *in personam* against the owner be dismissed, with costs to be taxed.

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It is the course of Admiralty Courts not to impose costs upon seamen when they establish probable cause for instituting suits for redress.

The practice formerly prevailing in this Court and in the Circuit Court, allowing the impeachment of a witness by proof of declarations made by him out of court, contradictory to his testimony, without requiring that he should be first examined with respect to them,—commended.

The rule more recently introduced into the English practice, and adopted in many of the State courts of the United States, which prohibits the impeaching of a witness by proving declarations of his contradictory to his testimony, unless he has been previously questioned in respect to such declarations, and afforded the opportunity to explain them,—disapproved.¹

THIS was a libel *in personam*, by Daniel Howland, one of the crew of the ship Elisha Denniston, against Andrew Conway, master of the vessel, to recover extra wages, by way of damages for being put on short allowance.

There were two other suits against the same respondent, brought by B. M. Travers and Henry Ware respectively, also members of the same crew. All three suits arose out of the same facts, and the other two were, by stipulation, made to abide the event of this.

The facts in proof bearing upon the libellant's claim are fully stated in the opinion. The principal question discussed, however, related to the propriety of impeaching a witness by proof of declarations made by him out of court, inconsistent with his testimony, without first calling the attention of the witness on cross-examination to the alleged discrepancy, and giving him an opportunity to explain. The facts on which this question arose were as follows:—

The libellants, to prove their case, read in evidence depoi-

¹ But see note at the foot of this case, on the rule laid down by the Supreme Court of the United States, in *Conrad v. Giffey*, 16 *How.* 38.

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tions of several of the crew, who testified that the bread served out to the crew on the voyage in question was wormy, dusty, filled with cobwebs, and not suitable or wholesome for food. To meet this testimony, the respondent introduced a witness, who testified that he was a custom-house officer, and had charge of the ship on her arrival at this port from the voyage; that he saw the several members of the crew whose depositions were read on behalf of the libellant at the time when they were paid off; that he heard them make statements in reply to questions asked them by the captain, to the effect that the bread supplied to the crew on the voyage was good. This testimony was relied on by the respondent as impeaching the credibility of the depositions. For the libellant it was contended that evidence of these contradictory statements out of court should not be regarded unless the witness sought to be impeached was, upon his examination, questioned as to his prior statements, and allowed an opportunity to explain.

C. Donohue, for the libellant.

W. R. Beebe, for the respondent.

BETTS, J. This was one of three suits brought by several of the crew of the ship *Elisha Denniston* against her master, for short allowance of bread on a voyage from New York to New Orleans, Mobile, Liverpool, and back to New York. The gravamen of the action is that the bread was wormy, dusty, and filled with cobwebs, and was not suitable or wholesome for food.

Two of the libellants and four others of the crew, all being colored men, and examined upon deposition, testified strongly to the badness of the bread, and their statements support the allegations of the libel. It is, however, proved by the custom-house officer, who had charge of the ship on her return to this port, that these latter four seamen distinctly declared that the bread supplied to the crew on the voyage was good, and that there was no ground of complaint in regard to it. The bread

which was left over of the ship's stores after the voyage was ended, was carefully examined by bakers in this port, and they found it to be then sound and good, equal to the best quality of bread, except pilot bread, furnished to merchant vessels at this port, and to be greatly superior to that supplied to English vessels in English ports. These facts, if considered in connection with the testimony showing statements made by the witnesses for the libellants in contradiction of their testimony, displace all foundation for any claim for wages by way of damages for short allowance. For it appears that the ship had an ample supply of suitable bread on board; twelve or fourteen barrels were taken from her after the voyage ended, and the quality is proved to have been then marketable and fair.

The libel must accordingly be dismissed on the demand for damages on the ground of short allowance; and as the other two suits were to depend on the decision of this, the same decree must be entered in them also.

The other question raised, whether the wages due to the libellants under the shipping agreement have been fully paid or not, is not properly before me upon this hearing.

The only point really requiring any consideration is the award of costs to be made. I consider that a color for the claim of extra wages is afforded, as it appears that the master ordered the bread to be baked over at Liverpool. This, as the evidence on the part of the master himself shows, is the usual course in case bread is wormy or mouldy; and it is reasonably to be inferred that the expense and trouble of rebaking the bread would not have been incurred in this regard, if it had been, during the whole voyage, pure and wholesome. It is shown in the proofs that the best and finest bread will occasionally breed worms, and require purifying by rebaking. As the ship had an abundant supply of bread, the officers ought to have taken pains to select that which was not so affected, and to have avoided serving out vitiated provisions. It is sufficiently evident, upon the whole case, although the important points in the charges and proofs of

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the libellants are refuted and discredited, that the complaint is not wholly groundless or malicious; for, in addition to these facts, several of the men swear that the mate was told the state of the bread, and that it was shown to him, yet his evidence is not put in by the respondent. It may be that the wormy bread was given out from inattention; but it was the master's duty to see that none but fresh provisions were used. The course of Admiralty Courts is not to charge costs upon sailors when they establish probable cause for instituting suits for redress; and I shall accordingly award no costs against them in these cases.

And if the witnesses not interested in the suits were, upon sound and safe principles of law, entitled to credit in these cases, I should allow the libellants summary costs against the master, upon the ground that although technically he could not be held chargeable for *short allowance*, yet his conduct in permitting bad bread to be given out to the men should be regarded as blameable and wrongful.

But deliberate declarations of these witnesses, made in direct conflict with their testimony, are proved against them; and their evidence, under such circumstances, will not, in law, justify a judgment in conformity to it, unless it be corroborated and supported by other proofs.

It was insisted that this evidence of contradictory declarations of the witnesses was to be disregarded, because the witnesses were not previously cross-examined in reference to such statements. And this view is sustained by the rule of evidence on this point, laid down in the Queen's case, (2 *Brod. & B.* 315; *S. C.* 6 *Eng. C. L. R.* 129.) In that case, certain questions of evidence arising out of the proceedings against Queen Caroline, were put to the Judges of England by the House of Lords. One of those questions was, Whether, according to the practice and usage of the courts below, and according to law, when a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by

him, . . . it would be competent to the party accused to examine witnesses in his defence to prove such declarations, without first calling back such witness examined in chief, to be examined or cross-examined as to the fact whether he ever made such declarations? The Judges were unanimously of opinion that, "according to the usage and practice of the courts below, and according to law as administered in those courts, the proposed proof cannot be adduced without a previous cross-examination of the witness as to the matter thereof." Chief Justice Abbott, in delivering the opinion of the Judges, speaks as follows: "The legitimate object of the proposed proof is to discredit the witness. Now, the usual practice of the courts below, and a practice to which we are not aware of any exception, is this: if it be intended to bring the credit of a witness into question, by proof of any thing he may have said or declared touching the cause, the witness is first asked upon cross-examination, whether or no he has said or declared that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary, and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the Court at once, which, in our opinion, is the most convenient course. If the witness denies the words or declarations imputed to him, the adverse party has an opportunity afterward of contending that the matter of the declaration or speech is such, that he is not to be bound by the answer of the witness, but may contradict and falsify it; and if it be found to be such, his proof in contradiction will be received at the proper season. If the witness declines to give any answer to the question proposed to him, by reason of the tendency thereof to criminate himself, and the Court is of opinion that he cannot be compelled to answer, the adverse party has, in this instance, also, his

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subsequent opportunity of the matter which is received, if by law it ought to be received. But the possibility that the witness may decline to answer the question affords no sufficient reason for not giving him the opportunity of answering, and of offering such explanatory or exculpatory matter as I have before alluded to; and it is, in our opinion, of great importance that this opportunity should be thus afforded, not only for the purpose already mentioned, but because, if not given in the first instance, it may be wholly lost; for a witness who has been examined, and has no reason to suppose his further attendance requisite, often departs the court, and may not be found or brought back till the trial be at an end. So that if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness, or to the party producing him, great injustice might be done, and in our opinion might not unfrequently be done both to the witness and to the party; and this not only in the case of a witness called by a plaintiff or prosecutor, but equally so in the case of a witness called by a defendant; and one of the great objects in the course of proceeding established in our courts is the prevention of surprise, as far as practicable, upon any person who may appear therein."

The same rule was laid down on the authority of the Queen's case, but with greater precision in *Angus v. Smith*. 1 *Mood. & M.* 473; S. C. 22 *Eng. C. L. R.* 360. Chief Justice Tindal there says: "I understand the rule to be, that before you can contradict a witness by showing he has at some other time said something inconsistent with his present evidence, you must ask him as to the time, place, and person involved in the supposed contradiction. It is not enough to ask him the general question, whether he has ever said so and so, because it may frequently happen that upon the general question he may not remember having so said; whereas, when his attention is challenged to particular circumstances and occasions, he may recollect and explain what he has formerly said."

I am aware that since the decision of the Queen's case, many of the State courts in this country have adopted the practice thus indicated.¹

¹ The rule in the Queen's case is still followed in England. Macdonnell v. Evans, 10 *Eng. L. & Eq. R.* 484.

For the course of American decisions on the subject, consult *Tucker v. Welsh*, 17 *Mass.* 160; *Brown v. Bellows*, 4 *Pick.* 188; *The People v. Moore*, 15 *Wend.* 419; *The United States v. Dickinson*, 2 *McLean*, 325; *Everson v. Carpenter*, 17 *Wend.* 419; *The Franklin Bank v. The Steam Navigation Company*, 11 *Gill & J.* 28; *Able v. Shields*, 7 *Mis.* 120; *Doe v. Reagan*, 5 *Blackf.* 217; *M'Intire v. Young*, 6 *Ib.* 496; *The State v. Marler*, 2 *Ala. N. S.* 43; *Weaver v. Traylor*, 5 *Ib.* 564; *Goode v. Linecum*, 1 *How. (Miss.)* 281; *Garrett v. The State*, 6 *Mis.* 1; *McAteer v. McMullen*, 2 *Penn.* 32; *Kay v. Fredrigal*, 3 *Ib.* 221; *Sharp v. Emmet*, 5 *Whart.* 288; *Seally v. The State*, 1 *Kelly*, 213; *Regnier v. Cabot*, 2 *Gilm.* 34; *Downer v. Dana*, 19 *Vt.* 338; *Palmer v. Haight*, 2 *Barb. S. C. R.* 210; *Story v. Saunders*, 8 *Humph.* 663; *Howell v. Reynolds*, 12 *Ala.* 128; *Clapp v. Wilson*, 5 *Denio*, 285; *Wilkins v. Babbershall*, 32 *Me.* 184; *Williams v. Turner*, 7 *Geo.* 348; *Johnson v. Kinsey*, *Ib.* 428; *Williams v. Chapman*, *Ib.* 467; *Moore v. Bettis*, 11 *Humph.* 67; *Clementine v. The State*, 14 *Mis.* 112; *King v. Wicks*, 20 *Ohio*, 87; *Sprague v. Cadwell*, 12 *Barb.* 516; *Carlisle v. Hunley*, 15 *Ala.* 623; *Nelson v. Iverson*, 17 *Ib.* 216; *Armstrong v. Huffstutler*, 19 *Ib.* 51; *Powell v. The State*, *Ib.* 577; *Titus v. Ash*, 4 *Foster*, 319; *Hedge v. Clapp*, 22 *Conn.* 262; *Bryan v. Walton*, 14 *Geo.* 185; *Smith v. The People*, 2 *Mich.* 415; *Wright v. Hicks*, 15 *Geo.* 160; *Wiggins v. Holman*, 5 *Ind.* 502; *Patchin v. The Astor Mutual Insurance Company*, 3 *Kern*, 268; *Ware v. Ware*, 8 *Greenl.* 42.

From these cases it would appear that the rule of the Queen's case has been adopted in the States of New York, Alabama, Georgia, Ohio, Michigan, Maryland, Missouri, Indiana, Illinois, and Tennessee; having, also, been expressly applied to the case of *depositions*, in New York, Alabama, Georgia, and Tennessee.

That it has been disavowed in Massachusetts, Maine, New Hampshire, Connecticut, and Pennsylvania.

That it has been adopted in Vermont; but with the exception that it is there held to be inapplicable to the case of depositions, whether taken with or without notice, and whether or not the adverse party attended at the taking or not. In case of deposition, the adverse party may, without previous inquiry, prove any inconsistent declarations or conduct of the witness. *Downer v. Dana*, 19 *Vt.* 338.

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Thus, in *Davis v. Kimball*, (19 *Wend.* 438,) the Supreme Court of the State of New York follows the ruling of the Queen's case and of *Angus v. Smith*, applying it to the special case of a witness examined upon commission by interrogatories and cross-interrogatories, whose deposition was sought to be impeached by proof of counter statements made by the witness out of court. And the Court answer the objection raised, that in the case of depositions taken under a commission there is no opportunity to call the attention of the witness to the inconsistent declarations, by remarking that there is no reason for a distinction between this and the case where the discovery of the evidence occurred after the cross-examination was ended, and the witness had left court and could not be brought back—a case which all the Judges in the Queen's case refused to make an exception;—and by the further suggestion that there is an additional reason for the application of the rule in the case of depositions, as otherwise a strong temptation would exist to tamper with witnesses to pervert or manufacture conversations after the execution of the commission, and when explanation would be impossible. *Ib.* 441.

So, also, Mr. Justice McLean, in the U. S. Circuit Court, adopts the same rule of evidence as the one prevailing in Ohio, and as therefore obligatory upon the courts of the United States sitting within that State. *McKinney v. Neill*, 1 *McLean*, 547. But it would seem to be the usage of the Court upon that circuit to regard the practice of the local courts as governing that of the federal courts there held. And see remarks of Story, J., in *Beers v. Haughton*, 9 *Pet.* 362.

The Circuit Court in this District, however, upon mature consideration, declined to adopt the rule of the Queen's case, considering the subject to be merely matter of practice resting in the discretion of the several courts. It was so treated by the Judges who assigned their reasons, in the House of Lords, for the rule. The argument in its support was not based on common-law principles of evidence. This view of

the subject seemed to us also to be consonant to authority. *Phill. on Ev.* ch. 8, 230; 2 *Cow. & H.* notes, 773; *Tucker v. Welsh*, 17 *Mass.* 166. We regarded the rule which we considered to have prevailed in England and in this State, prior to the Queen's case, to be recommended by considerations of higher weight than those adduced in support of the rule declared in the Queen's case; but which was not directly sanctioned by the New York Supreme Court, previous to 1838. It is clear, from the decision in 1836, (*The People v. Moore*, 15 *Wend.* 410,) that at the date of that decision, the courts of this State had not adopted the rule of the Queen's case, which had been promulgated as early as 1820; nor was that rule observed in the early practice of the English courts. 1 *Phill. on Ev.* ed. 1820, 212; *Peake's Ev.* 89; 1 *Starkie on Ev.* 1st ed. 1451; 2 *Esp.* 601; *Hawk. P. C. B.* 2, ch. 46, § 14; 1 *McNally on Ev.* 378. Nor had it prevailed, at least to any great extent, either among the courts of the several States of the United States, anterior to the Queen's case; (1 *Hayw. N. C. R.* 437; *Tucker v. Welsh*, 17 *Mass.* 166; 4 *Pick.* 441; 1 *Serg. & R.* 526; 2 *Esp. N. P.* ed. 1811, 540; *Baker v. Arnold*, 3 *Cai.* 279; *The People v. Vane*, 12 *Wend.* 79; 8 *Greenl.* 42;) or among the courts of the United States. 1 *Wash. C. C. R.* 413; *Gilp.* 616; 1 *Pet. C. C. R.* 203. We discerned nothing in the reasons governing the Queen's case to induce us to change the practice heretofore adopted in the Circuit Court and in this Court, to conform to that decision. It seemed to us that the more sound and consistent course was to require the party whose witness was impeached by proof of his contradictory statements, to assume the burden of producing the witness again to explain his own declarations. The case of *Judson v. Blanchard*, (4 *Conn. R.* 557,) is an authority allowing that to be done. The testimony of the witness in court may be the occasion of recalling to the memory of others what he had said elsewhere; and thus contradictory statements may often, as we considered, come, for the

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first time, to the knowledge of the party interested to produce them, after the examination and the cross-examination of the witnesses had closed, and very probably after he was out of the recall of such party, and thus even life be saved against the testimony of unscrupulous and perverse witnesses.

These considerations, with others, satisfied the Court that the old and familiar practice in this respect was to be preferred to that established by the Queen's case, as a means for unmasking fictitious evidence, and protecting property, life, and character exposed to peril by the oaths of reckless witnesses. This rule is more emphatically important in respect to evidence given under commissions or by deposition, than to that given orally in open court. We accordingly have held that the credibility of a witness may be impeached by proving his declarations made out of court, and contradictory to his testimony, without a previous examination.¹

I am accordingly of opinion that the depositions offered by the libellants, in support of their libel, may be impugned by evidence of the contradictory declarations made by the witness not on oath, and that upon the whole evidence the equity preponderates in favor of the respondent, upon the question of his liability to the libellants for costs. The libel must therefore be dismissed, without costs, unless, upon the report of the commissioner, a balance of wages earned under the shipping articles shall be found due to the libellants.

Decree accordingly.

¹ The rule laid down in the text, prevailed in both the Circuit and District Courts in this district, until the decision of the Supreme Court of the United States, in *Conrad v. Giffey*, 16 How. 38, decided in 1853. In that case it was held, Mr. Justice McLean delivering the opinion of the Court, that the rule of the Queen's case is a salutary one, and should be followed in the Courts of the United States. That rule has, therefore, now become the law governing the practice of the United States Courts in this district; but it was thought proper to preserve the history and reasons of the change therein, established in 1853.

A RAFT OF SPARS.

A Court of Admiralty will not order a salvage suit to be set aside or to be stayed because there is pending in a court of law an action of replevin for the salvaged property, brought by the owner against the salvor, and in which the validity of the salvor's lien upon the property may be determined.

THIS was a libel *in rem*, filed by John S. Keteltas, against a certain Raft of Spars, to recover compensation for salvage services.

The facts out of which the action arose were, in brief, as follows: On April 8, 1848, the libellant observed the Raft in question, which consisted of sixteen spars, to be adrift below the Narrows and floating out to sea. He procured the assistance of two or three other persons, and the whole party, by means of boats, stopped the Raft, and towed it to the Staten Island shore.

On the 9th of April, the libellant gave notice to one of the coroners of Richmond county of his having found the Raft, and requested him to take possession of it, and to publish notice of its having been recovered, for the benefit of the owners. On the 10th of April, the coroner caused an advertisement to be published in the New York Commercial Advertiser, stating that the Raft had been found and was in his possession. It was claimed by the owner, who offered the libellant \$30 for his services rendered. This sum the latter refused to accept.

On the 14th of April, the alleged owner served on the present libellant a writ of replevin, issued out of the Supreme Court of the State of New York, to procure the delivery of the Raft to himself—he having previously executed, in due form, the bond required by the then existing law of the State. The libellant, at about the same time, instituted this suit for salvage, in his own name, and caused the Raft to be attached

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in his favor by a deputy marshal of the United States. The persons associated with the libellant in salving the Raft, thereupon came in by petition, asking that they might be made parties to the suit with the libellant, and that salvage compensation might be awarded to them also.

The owner of the Raft, George W. King, intervened in the suit by claim and answer; and he now moved that the action in the District Court be wholly set aside; or that, if he was not entitled to that relief, then that all proceedings in it be stayed until the replevin suit in the State Court be determined.

Other circumstances involved in the case, but not important to this motion, are stated in the report of the decision upon the merits, made in February, 1849, and reported *post*, in its order of date.

Martin & Smith, for the motion.

J. B. Purroy, opposed.

BETTS, J. The depositions upon which the motion now before the Court is founded, attempt to show that the timber had been wrongfully if not feloniously taken from the possession of the claimant; and they make suggestions tending to charge the libellant with an improper acquisition or possession of the property.

The testimony upon the other side, however, wholly displaces, as far as this proceeding is concerned, any pretence for the imputation of dishonest or improper conduct on the part of the libellant, in obtaining possession of the timber which forms the subject of the suit; and, accordingly, the motion must be decided upon the assumption that the libellant came *bonâ fide* into possession of the Raft by finding it adrift at sea, and by a laudable effort to save it from being lost.

Accordingly the single point which arises for decision upon the motion is, whether this Court will, either as matter of

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right to the claimant, or by comity towards the municipal courts, cause the prosecution of this action to surcease until the action at law in the State Court is determined.

It is plain, from the course of decision in the Supreme Court of New York, (*Bowne v. Joy*, 9 *Johns.* 221; *Walsh v. Durkin*, 12 *Ib.* 99,) and of the Circuit Court of the First Circuit, (Certain Logs of Mahogany, 2 *Sumn.* 589,) that the pendency of the replevin suit in the State Court ought not to be regarded as a legal bar which could be pleaded in abatement to the libel *in rem* in this Court. Not only are the jurisdictions, so far as concerns the question under consideration, foreign to each other, but an action in replevin and an attachment *in rem*, to enforce a lien by the process of an Admiralty Court, are proceedings which are in their nature distinct, although the property which forms the subject of each proceeding may be the same. The matter triable in a replevin suit must relate to the taking, or to the better *title* or right of *possession* of the particular parties to the suit in the property in question. 2 *Rev. Stats.* 522, §§ 1, 53, 54, 64. In the present case, it must be limited to the question, whether the libellant has acquired an incumbrance upon the Raft against all the world in the character of salvor. The validity of the lien may become an essential inquiry in the replevin suit as well as under the attachment in this Court; so that in the former cause, the court of law, in adjudicating upon the claim of the plaintiff to the possession of the Raft, may incidentally decide upon the right of the defendant to salvage compensation. This, however, will not necessarily be the case. The right of *possession* may very possibly be determined without drawing in question the validity of the asserted lien. For instance, inasmuch as at common law the right of possession of chattels, by virtue of a *lien*, depends on a continued occupancy and holding of the thing to which it is claimed the lien attaches, and as any voluntary relinquishment of the actual possession, however temporary, may have the effect of

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discharging and extinguishing the lien, (*Meany v. Head*, 1 *Mason*, 319; *Exp. Foster*, 2 *Story*, 131; *Story on Bailm.* § 440, 588,) the court of law might be bound to adjudge the property in suit to the plaintiff in the action of replevin, in case the defendant failed to prove an uninterrupted holding of it, under his salvage incumbrance. This would leave the actual right of the salvors wholly out of view.

I do not say that the Supreme Court cannot shape the issues in the replevin suit so as to determine the question of salvage, and so as also to settle between the co-salvors themselves the proportions of the whole sum awarded, which may be due to each of them respectively, or that they cannot compel the payment of what may be found due, by means of the replevin bond; but only that it is by no means clear that these things must and will be settled in the action at law. It is manifest, however, that the procedure requisite to accomplish those objects would be but little in consonance with the course of practice in law courts, and would be an awkward and ungainly mode of dealing with the interests of salvors.

There are several cases to be found in the reports of the courts of this State which evince the difficulty of rendering a judgment in a replevin suit which shall coincide fully with the true rights and equities of the parties. See *Bemus v. Beekman*, 3 *Wend.* 667; *Rogers v. Arnold*, 12 *Ib.* 32; *Pierce v. Van Dyke*, 6 *Hill*, 613; *Anstice v. Holmes*, 3 *Den.* 244.

Moreover, even if the questions to be tried in the two suits were identical, the difference between the remedies awarded and the fact that the remedy in Admiralty by attachment of the property itself is more sure and expeditious than that given at law, would operate strongly in inducing the Court not to exercise its discretionary power over the suit in this Court, in such manner as to give a preference to the more dilatory and uncertain procedure at law.

And it is manifest that the difference indicated by Judge Story, in the case already cited, (*Certain Logs of Mohogany*,

2 *Sumn.* 589,) between the *parties* to the two actions, would deter the Court from arresting the one *in rem*. In addition to the reasons governing that case, there should, in the present case, be added the consideration that the several libellants may have interests in the suit which are wholly different. It is the daily business of Admiralty Courts to adjudicate between salvors themselves the appropriation of the salvage reward, in the action instituted against the property saved; and salvors are not driven to separate suits for the purpose of procuring such adjustments. This end could not be attained with any convenience or celerity in a suit in replevin. The direct issues could hardly embrace the questions arising between the salvors; and a suit upon the bond given to secure the damages sustained by the defendant, even if his services could be in this manner fully remunerated, would scarcely avail to the benefit of the co-salvors, who are not parties to the record in the replevin suit.

Nor is the fact to be lost sight of, in estimating the importance of these differences in the two proceedings, that even if in the replevin suit a judgment might be given determining the right of the salvage reward, and the amount to be allowed therefor, such judgment must, in conformity to the course of law courts, be rendered solely in favor of the defendant in the action, he alone appearing on the record to maintain that interest. The proceeds of any recovery must go into his hands, leaving his co-salvors to the inconvenience of separate actions against him for the recovery of their shares. The Admiralty Court, on the other hand, acts directly upon the property and its proceeds, and administers their distribution according to the rights of all parties, whether litigants in the original proceedings or not.

Again: in a replevin suit against salvors, they may be drawn into controversies between outside parties on conflicting claims to the property saved, or to the true right to its possession, in none of which matters they have any interest.

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Their right attaches to the property saved, irrespective of the ownership of it, or to the possessory interests of others. To determine and satisfy their right does not involve the necessity of inquiring into the title or privileges of other parties, and salvors ought not to be compelled to forego the peculiar and expeditious remedy allowed them in Admiralty, and to abide the result of protracted and entangled litigation with others as to the possession of or title to the property subject to their incumbrance.

Upon these considerations, I do not regard the claimant as entitled to the interposition for which he asks; and am equally clear that to grant the application considered as addressed to the discretion of the Court, upon grounds of comity or otherwise, would be inexpedient, and, indeed, unjust. The papers before me do not show that there is any pending conflict of jurisdiction over the subject-matter, between the State Court and this Court. The libellant has no manual or positive possession of the timber given him by the process of this Court, under which he resists or thwarts the writ of replevin issued by the State Court. The question, so far, is merely a speculative one, whether the arrest under the law writ or the attachment shall be the effective one; and until the opposing action of the marshal and sheriff, under those processes, shall make it necessary to determine that point, this Court will forbear intermeddling with it, and leave the action here to take the usual course. The motion to supersede or stay the action brought in this Court is accordingly denied. The costs of the motion are to abide the decision of the cause upon the merits.

Order accordingly.

GAINES v. TRAVIS.

A party cannot be allowed, after receiving a pleading and replying to it, to treat it, upon any ground of defect afterwards discovered, as a nullity, and proceed as if none had been served.

After a bond has been given by a respondent to the marshal, in compliance with the Rules of the Supreme Court, the libellant cannot exact any additional stipulation.

If the former Rules of the District Court respecting security to be given for costs may be considered as still in force for the purpose of protection to the officers of the Court for the recovery of their fees, this is not a matter which affects the libellant, and he is not entitled to ground any proceeding on the omission of the respondent to give the security prescribed by those rules.

The libellant entered an irregular default against respondent, and moved the cause on for hearing on a reference to a commissioner. The respondent appeared, took no objection, but consented to adjournments.

Held, 1. That his appearance, &c., before the referee, constituted a voluntary consent on his part to waive the irregularities committed, and to submit the case to the determination of the commissioner.

2. That the Court had power, however, to set aside the proceedings, and would do so, on terms, inasmuch as it was necessary to do so in order to enable the respondent to have the benefit of his real defence.

THIS was a libel *in personam*, by Levi Gaines against John H. Travis, to recover seamen's wages.

The libellant having proceeded to bring the cause to a hearing before a commissioner as upon default to answer, the respondent now moved, on grounds which fully appear in the opinion of the Court, to set aside the default and all subsequent proceedings for irregularity.

S. Sanxay, for the motion.

Alanson Nash, opposed.

BETTS, J. The respondent moves to set aside the default taken against him by the libellant, and all subsequent proceedings, for irregularity.

Both parties also put in statements touching the merits of

the case, but it is not necessary at this stage of the cause to discuss them.

The monition in the cause was returned on the 25th of April. The respondent appeared by his proctor, and a few days' time were conceded him by the libellant's proctor to put in an answer. The answer was filed and served on the libellant's proctor on the second day of May, and on the same day a notice was given by the latter in conformity with the provisions of Rule 88 of this Court, to the proctor of the respondent, that the matters of defence set up by the answer would be contested on the hearing of the cause.

The cause was thus properly at issue on the merits, and neither party could afterwards proceed in it, except in subordination to the rules governing the practice of the Court in respect to issues duly joined.

At this point in the proceedings both parties deviated from the established course of practice, and were each guilty of irregularities.

The libellant having ascertained that the answer was filed without the stipulation for costs required to be given by the rules of the Court, regarded it as a nullity, and proceeded to a reference before a commissioner. Notice of the reference was given to the libellant, who appeared before the commissioner, and without making any objection to the course of proceedings, consented to adjournments of the hearing which were directed by the commissioner.

The course pursued by the libellant, in bringing the cause on before the commissioner, was irregular and unauthorized in two respects.

The answer had already been accepted, and an issue framed upon it as perfect; and the libellant was thereby precluded from disregarding it, and must appeal to the Court to compel the respondent to take further steps, if required for his protection, or for an order that the answer be deemed a nullity. A party cannot be allowed, after receiving a pleading and

replying to it, to proceed as if none had been served. If, indeed, he is not to be held in such case absolutely concluded from objecting to it, either as imperfect in form or as put in in an improper manner, he must at least apply to the Court for relief, and cannot take the decision of the question into his own hands, at discretion.

The answer was, however, regular and complete as against the libellant; and this furnishes the second ground of objection to the practice adopted by him. After a bond has been given to the marshal, pursuant to the rules of the Supreme Court, the libellant has no power to exact any additional stipulation from the respondent. If the rules of this Court conflict with Rule 3 of the Supreme Court, they are superseded by it. The rule of the Supreme Court not only secures to a libellant all the protection provided by the rules of this Court as to costs, but more than that, the sureties to the bond became bound absolutely for the performance of the decree of the Court; that is, in a case like this, for the payment of the debt. Accordingly, if the libellant required from the respondent the stipulations directed by the rules of the District Court, he would of necessity be obliged to relinquish the higher security held by him in the bond to the marshal.

There may, indeed, be a doubt whether the costs payable to officers of the Court are secured by the terms of the bond to the marshal. The clerk might, therefore, be justified in exacting pre-payment of those costs, before receiving and filing an answer or other pleading on the part of the respondent, or rendering other services on his behalf; or possibly the rules of this Court may be held to remain yet in force, *hac tenus*, in protection of the interests of the clerk and marshal. The duty of giving a security which shall enure to the protection of the officers is, however, a matter which in no way affects the libellant, and he is not entitled to look into it, or to ground any proceeding upon his part, on its omission or imperfect performance by the respondent.

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Had the respondent rested upon his rights, the Court must have set aside the proceedings as wholly irregular, and the entry of an order of reference as nugatory. But he having appeared upon the reference, on due notice thereof, and consented to adjournments ordered by the commissioner, he must be held to have waived the irregularity, and to have assented to the reference.

The Court would, accordingly, hold the respondent to his implied election, and leave the question of the accounts between the parties to the investigation and report of the commissioner, if it were not made to appear that the respondent relies for his defence on evidence showing a payment received by the libellant, in full satisfaction of his demand; while the libellant resists the admissibility of the evidence under the order of reference. As this is a matter which does not appropriately come within an order of reference, there is a formal difficulty in trying the question of award and satisfaction before a commissioner under a general order of reference; and, therefore, to save the respondent from the loss of all opportunity to prove his defence, I shall direct the order of reference to be rescinded, and that the parties proceed to final hearing before the Court on the issue as it stands.

Stress was laid by the counsel for the libellant upon Rule 40 of the Supreme Court, as limiting the authority of this Court in setting aside defaults. That rule has reference to more solemn and definite decrees, if, indeed, it is not confined in its application to final decrees in the cause. Rule 29 would be the one most applicable to the subject, if the action of the Court is controlled by either. The inherent powers of all courts enable them to regulate the incidental and interlocutory orders and practice in the progress of a cause, and this Court, so far as it is not restrained by the Supreme Court, can do so at its discretion. Those rules of the Supreme Court are in affirmance and not in restraint of that power.

The order of reference will, however, be revoked, on condi-

tion that the respondent pay the costs created before the commissioner appointed by it. He is to be regarded as a voluntary party to those expenses; for if he intended to avail himself of the irregularity committed by the libellant in taking out the order, he ought to have done so when first apprised of it; and he cannot thus, by his acquiescence, induce the accumulation of costs and then cast them upon the libellant. The Court will not, upon the proofs, hold his assent and acquiescence as conclusively binding upon him; but there would be no equity in relieving him from their effect upon easier terms than the reimbursement of the costs accrued from his own act. The libellant will not, however, be allowed any costs except disbursements actually incurred by the reference. His preliminary steps being irregular in themselves, cannot be the occasion of costs in his own favor against the respondent.

*Order accordingly.*¹

¹ This cause came before the Court again in November, 1848; on a final hearing. It then appeared that the payment relied upon by the respondent as his defence, was made upon a private settlement of the suit between the parties, out of court, and without the concurrence of the libellant's proctor, and that the libellant's proctor was now continuing the suit to recover his costs.

Held, that the rule was settled that such a settlement of a suit is to be regarded as fraudulent as against the proctors and officers of the Court; that the settlement could not exonerate the respondent from his liability for costs; that the proper mode for a proctor to recover his costs in such case was by prosecuting the suit commenced, as if it had not been interfered with by the libellant; and that, upon the evidence, the decree must, therefore, be that the libellant recover his taxable costs in the cause.

The cause came before the Court for the third time, in January, 1849, upon a motion on behalf of the stipulator, to set aside the proceedings taken subsequent to the decree, and also to discharge him from arrest. The proceedings had at that time will be reported *post* in their order of date.

The Bark Laurens.

THE BARK LAURENS, AND \$20,000 IN SPECIE.

Where an attorney in fact of an absent owner of property, intervened on his behalf by claim and answer, and the owner afterwards came within the United States, and moved to be allowed to defend in his own name,—*Held*, that he was entitled to do so on payment of costs of opposing the motion, and on entering into a new stipulation for costs.

An increased stipulation for costs should not be required from the claimants on account of a delay in the progress of the action, occasioned or obtained by the libellants.

THIS was a libel *in rem*, filed by the United States against the bark Laurens, and \$20,000 in specie on board her, alleged to be forfeited to the United States for being employed in the slave-trade, in contravention of the acts of Congress of March 27, 1794, and May 10, 1800.

The libel was filed March 15, 1848. On April 7th, following, George M. Usher intervened, by claim and answer, as attorney in fact of the firm of Suarez & Co., residents in Brazil, and set up a title in that firm to the \$20,000 in specie libelled and attached in this cause, and also took issue upon all the allegations in the libel. On the 13th of April the original libel was amended, and on the 13th of May separate answers, but substantially the same as the first, were put in by the same attorney, both taking issue upon the allegations of the libel; and Manuel D'Arango Costa, one of the firm, at the same time filed his claim (by the same attorney) to the specie.

A motion was now made on behalf of the claimant to permit the claim to the specie thus put in by D'Arango Costa to be withdrawn, and to allow Suarez, another member of the firm, now in the United States, to come in and claim the specie in his own name and right, as sole owner of it.

This motion was opposed on the grounds on which it was based; and a cross-motion was also made, that if the leave

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asked were granted, it should be only on terms that the stipulation given for costs should be increased.

B. F. Butler and F. F. Marbury, for the United States.

O. Hoffman and O. Hoffman, Jr., for Suarez.

BETTS, J. No laches on the part of Suarez are shown in this case which should deprive him of the privilege of placing himself rightly before the Court in this somewhat complicated controversy. The transaction giving rise to this prosecution took place at Rio Janeiro, where all the claimants resided, and with which it is asserted on their part, they were connected by acts and interests independent of their copartnership relation. Mr. Usher, a general agent of the claimants, intervened in their behalf, on the arrest of the ship and specie, and filed answers and claims in the character of attorney in fact of the copartners, and also of an individual member of the firm; none of the actual parties in interest being then in the United States.

Mr. Suarez, now representing himself to be a member of the firm, and individual owner of the specie seized, asks to have the claim thereto interposed by Usher, as attorney in fact, withdrawn, and that he have leave to file a claim in his own right to that branch of the action. Nothing is brought before the Court on the part of the United States which should prevent the grant of that privilege, or that should subject it to unusual conditions or impediments. No delay of the suit has been caused, nor have additional costs been created by the method of appearing and making claim; and all the interest the libellants have in the proceeding is that their indemnity against costs shall not be diminished.

Suarez may, accordingly, file a claim to the specie in his own right, on giving stipulation in \$250. The former claim and stipulation will stand to cover antecedent costs and as a portion of the proceedings in the cause to the time the new claims shall be entered, and be either ordered by the Court or

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admitted by D'Arango Costa, to be substituted for the prior claim to the specie. It is in consonance with the usages of all judicatories to make the proceedings in a suit subject to the direction of the real parties in interest, and in Admiralty the common practice is to have the action conducted in their names.

The United States insist that this motion ought to be denied, unless the applicant gives security for all costs which shall arise from the delay which may be incurred in taking testimony abroad, to meet the right he sets up in defence to this action. There is no face of equity in such claim. The libellants are to be presumed prepared to maintain their suit when they institute it, and there is no reason for exacting compensation to them for delays made by the libellants in their own preparation. No additional security for costs can be granted them for that cause. The equity would rather rest with the other side, and the claimant be allowed to exact an immediate trial of the case, or that the libellants indemnify him from expenses created by protracting the determination of the cause.

The importance of the case, in point of amount or of its consequences, ought not to vary the general rules of practice, and the government have no immunities or privileges in their prosecutions not shared in common by individual suitors.

It is therefore ordered, that Mr. Saurez be authorized to appear in the cause, in his own name, and file an individual claim to the specie under arrest, on payment of the costs of this motion, and entering into a new stipulation for \$250, leaving the former stipulations to stand to cover antecedent liabilities; and it is further ordered, that the application on the part of the United States for any additional stipulation be denied.

*Order accordingly.*¹

¹ The cause came again before the Court on the merits, in July, 1849; when a decree was rendered declaring the vessel and cargo forfeited.

The Lucinda Snow.

THE LUCINDA SNOW.

It is well settled in this country, that the master, as such, has authority to sell a wrecked vessel, when he proceeds in good faith, exercising his best discretion for the benefit of all concerned ; and this whether the sale is made in view of a peril then involving the vessel, or of one likely to ensue, from which, in the opinion of persons competent to judge, she cannot be rescued.

The circumstance that the *master* who has sold a stranded vessel believed at the time that he could get her off, would be pertinent to show bad faith avoiding the sale ; but proof that the *purchaser* believed himself able to rescue the vessel, can have no such effect.

The degree of *necessity* which justifies the sale of a wrecked vessel by the master,—defined.

The purchaser of a wrecked vessel from the master is not bound, in order to maintain his title, to furnish direct and positive evidence of the honesty of the master's conduct and of the necessity of the sale ; but presumptive proof of those facts is sufficient.

THIS was a libel *in rem*, filed by Alfred Peabody against the schooner *Lucinda Snow*, to recover possession of that vessel.

W. W. Rogers intervened by claim and answer, setting up a title to the vessel by purchase at auction, under the following circumstances.

The schooner was purchased at Boston jointly by the libellant and one Dawson Lincoln, for a joint commercial adventure, the vessel to sail under the command of Lincoln as captain. The two purchasers loaded her with a cargo upon joint account ; and in December, 1846, the schooner, thus loaded, was dispatched by Peabody and Dawson, under the command of Dawson, on a voyage to Galveston and a market.

She reached Galveston and delivered her cargo, and was there loaded on freight for the Rio Grande ; and having accomplished this voyage, she was chartered by the government of the United States for a further voyage,—in the prosecution of which she was cast away on the island of Sacrificios, near Vera Cruz, in the storm known as the great

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“Norther” of May 2, 1846. The gale prevented any aid being rendered to the vessel until May 3d, when a survey was made under the direction of Captain Lincoln. The vessel was condemned to be sold; and on May 8th she was sold at auction by the government auctioneer, and was bought by the claimant for \$1,750.

Other circumstances are stated in the opinion.

The libellant claimed the vessel as sole owner.

A. F. Smith, for the libellant.

I. The *onus* of proving the validity of the sale rests on the claimant. The *Brig Sarah Ann*, 2 *Sumn.* 214, 215; S. C. 13 *Pet.* 387.

II. The claimant must make out *good faith in the master*, and a case of *extreme necessity*. The master has no authority to sell unless in a case of extreme necessity. 3 *Kent*, 5th ed. 131. He may sell, provided it be done in good faith, and in a case of supreme necessity, which sweeps all ordinary rules before it. 3 *Kent*, 173. At all events, a sale can only be justified by extreme necessity and the most pure good faith. *Abbott on Shipp.* 26. All the circumstances must be submitted to the jury, and they must find both the necessity and good faith. The *Patapsco Insurance Company v. Southgate*, 5 *Pet.* 604. It is not sufficient that the sale be one of good faith on the part of the master, and for the benefit of all concerned, unless there be an urgent necessity. The *Schooner Tilton*, 5 *Mason*, 465, 475. For it is certain that he has no authority to sell unless in a case of extreme necessity, and when he acts with the most perfect good faith. *Gordon v. The Massachusetts Fire & Marine Insurance Co.* 2 *Pick.* 262. It is not sufficient that the master acted in good faith and in the exercise of his best discretion; the claimants must prove there was a moral necessity for the sale, so as to make it an urgent duty upon the master to sell. The *Brig Sarah Ann*, 2 *Sumn.* 214; S. C. 13 *Pet.* 387. If the circumstances were such that an owner of reasonable prudence and discre-

tion, acting upon the pressure of the occasion, would have directed a sale, *from a firm opinion that the vessel could not be delivered from her peril, &c.*, the sale is said to be valid. The Sarah Ann, 2 Sumn. 214, 215; The Fanny and Elmira Hicks, Edw. Adm. R. 117; The Ship Fortitude, 3 Sumn. 248, 249; Robinson v. The Commonwealth Insurance Company, 3 Sumn. 227; Sale v. The Royal Assurance Company, 8 Taunt. 755; 3 Brod. & B. 151; Abbott on Shipp. 7 to 24, and cases cited.

III. A more stringent rule is applied as between the purchaser from the master and the owner, than between the owner and underwriter. The Schooner Tilton, 5 Mason, 465, 475.

IV. Upon the question of *necessity*, it seems that the actual conduct of the master, in connection with the other circumstances, is to be taken into consideration. In other words, fraud, upon the part of the master, is evidence of a want of necessity. Robinson v. The Commonwealth Insurance Company, 3 Sumn. 227.

V. The fact that the vessel was got off is certainly a strong circumstance against the necessity for the sale. The Brig Sarah Ann, 2 Sumn. 215, 216; Abbott on Shipp. 22, note. It is, however, by no means conclusive. We must weigh all the circumstances. 1. The position and exposure of the vessel. 2. The season of the year. 3. The danger from storms. 4. The expense. 5. The probable chances of success in getting her off. 6. The necessity for immediate action.

VI. Necessity is not to be inferred from the fact that the sale is in good faith. The Patapsco Insurance Company v. Southgate, 5 Pet. 604, 620, 621.

VII. A survey is not conclusive as to the state of the vessel, though, if regularly and honestly made, it is very strong evidence. Fontaine v. The Phenix Insurance Company, 11 Johns. 293; Anthon's N. P. R. 16, note a. If the surveyors acted fairly, and the master acted fairly, his acts in conform-

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ity with their opinions will be justified, unless it shall be made to appear that the facts on which they founded their opinion were untrue, or their inferences incorrect, and the burden lies on those who impeach the survey. *The Brig Sarah Ann*, 2 *Sumn.* 264. The report is presumed to be made in good faith, and fairly, unless the contrary appears. *Gordon v. The Massachusetts Fire & Marine Insurance Company*, 2 *Pick.* 264; *The Ship Fortitude*, 3 *Sumn.* 228.

VIII. Admiralty surveys are inadmissible to prove the facts they recite. *Abbot v. Sebor*, 3 *Johns. Cas.* 46; *Salters v. The Commercial Insurance Company*, 10 *Johns.* 487. The facts must be proved like other facts. *Cort v. The Delaware Insurance Company*, 2 *Wash. C. C. R.* 375; *The United States v. Mitchell*, 2 *Ib.* 478; *Henry Hall v. The Franklin Insurance Company*, 9 *Pick.* 466. The survey is not evidence of the facts, but only that a survey was made. *Watson v. The Insurance Company of North America*, 2 *Wash. C. C. R.* 152.

E. C. Benedict, for the respondent.

I. This is a possessory action. Now it is clearly impossible to say what interest libellant may have in the vessel till the accounts are taken between him and Lincoln, who were partners in the joint adventure of the vessel, her cargo, and freight. That account cannot be taken in Admiralty, and this possessory action must fail for that reason.

II. Lincoln and the libellant, being partners in the vessel and cargo, and Lincoln being in charge of the property as master and managing owner, he was competent to give a good title for the whole vessel, (she being wrecked,) on being actually paid for her her full value, as he was by the claimant. 3 *Kent*, 3d ed. 154. And the co-owner cannot sustain a possessory libel without proving, affirmatively, such collusion or fraud or knowledge on the part of Rogers, as would destroy his character as a *bonâ fide* purchaser.

III. Captain Lincoln was, at the time of the sale, owner

of one half of the schooner—the papers of the vessel were in his name, and he was actually half owner. The transaction between him and the libellant was a mere mortgage, neither transferring the title nor the possession, and was not registered nor entered on the register. Lincoln was quite competent, then, to sell and convey one half of the vessel, and receive the purchase-money; and the claimant, Captain Rogers, therefore, in any view of the case, has a good title to *one half* the vessel, and the other owner having no greater share, cannot sustain a possessory libel for the *whole*.

IV. Under the foregoing circumstances, the sale to Captain Rogers was more than a sale of a stranded vessel by a mere master. It was a sale by a master having an unusual interest and control, and clothed with an unusual discretion as master, and being also an equal owner and partner, and authorized to advise and direct the master. A purchaser, under such circumstances, will not be held to such stringent rules as are applied to a sale by a mere master.

V. But if this were a case of a sale by a mere master, the title of Captain Rogers would be good.

VI. The powers of a master of a vessel flow from the nature and necessities of his employment. He must have, in most matters, the rights of ultimate and absolute sovereignty. He unites the legislative, judicial, and executive functions in the police and management of his ship's company, and he has the right of eminent domain, so to speak, in all the property under his charge, cargo as well as ship, and whenever required by the perils to which he must be continually exposed, and which in detail can never be foreseen; he may subject it to taxation, (average contribution,)—he may destroy it, (jettison or cutting away,)—he may encumber it, (bottomry,)—he may also use it, (food and clothing,)—he may sell it to make repairs, &c.,—and he may abandon it;—and the power to sell the shattered relics of his vessel when stranded, that he may bring home the proceeds to his owner,

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is as reasonable and necessary as any other of his powers. He has all these powers, subject only to the limitation that in his honest judgment, aided by that of those about him, actual injury and *imminent peril* makes it expedient, for the common good of those interested, that he should exercise the power. *Lawrence v. The New Bedford Insurance Company*, 2 *Story*, 479; *Parker v. Hunter*, 7 *Mees. & W.* 342; *Smith on Merc. L.* 173.

VII. The necessity which the law requires as the justification of the sale of a stranded vessel by the master, is only such necessity as makes it an urgent duty upon the master to sell for the preservation of the interest of all concerned. The necessity is to be determined in each case by the actual and impending peril to which the vessel is exposed, from which it is probable, in the opinion of persons competent to judge, that the vessel cannot be saved. 2 *Story*, 479; 13 *Pet.* 401.

VIII. This "necessity," "the actual and impending peril," must of course be "determined" on the spot, and at the time where and when they exist; because there only can they be seen, and there only can the sale take place, and there must the rights of the purchaser be fixed, or the sale would be nugatory or a fraud; and it must be determined *by the master*, the appointed agent and trustee of all parties, because he alone is there to determine it. To give strength and respectability to his determination, and to preclude injurious imputations, the law counsels him to protest publicly, before a proper public officer, to have a public survey by sworn surveyors, and suitable public notice and a public sale, but it does not require him or them to judge infallibly. The necessity of a sale cannot be denied when the peril, in the opinions of those capable of forming a judgment, make a loss *probable*, though the vessel may in a short time be got off. The fact of her being got off raises no presumption of the master's incompetency, or that of his advisers. Nor does her strength or condition, or costs of repairs, as subsequently ascertained,

raise a presumption against the necessity, because they are all subsequent to "the actual and impending perils." It is, therefore, not the *real* and *inevitable* peril and an *absolute* necessity which make the sale valid, but the apparent peril and necessity; the probable loss.

X. The very existence of the necessity, or the duty or expediency of a sale, presupposes that there are other persons whose means and resources or wants are such that in their hands the actual and impending peril is not so formidable as in those of the master, and that they can make it profitable to buy, otherwise there could be no sale.

XI. The "actual and impending peril" is made up of many elements. The incompetency, want of means (no matter how produced) of the master,—the locality,—the proportion of vessels lost or saved on the same beach,—the general opinion of the hopelessness of a loss,—the absence of mechanics, and of tools and materials,—the liability to sudden and unwarned perils rendering it necessary for all other vessels to keep their own means under their own control,—the existence of a state of war,—and the lawlessness and absence of regular government,—all enter more or less into the peril.

XII. Nor can the necessity or propriety of a sale be at all affected by the mode in which the stranding was produced. If the absence of the captain or crew,—the loaning of her chains and anchors,—the neglect of the captain,—caused the vessel to go ashore, or deprived him of the means of getting her off, it would not affect the purchaser. It is the "*actual and impending peril*," no matter how produced, which justifies the sale.

BETTS, J. The schooner Lucinda Snow was stranded on the island of Sacrificios, near Vera Cruz, about May 1, 1847, in a violent norther. She was driven up into the sand of the beach two or three hundred feet, and several hundred yards beyond a depth of water sufficient to float her.

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About twenty vessels were wrecked in that vicinity in the same gale.

The master, who was also half owner, called a survey. The particulars of the survey are not proved by any party who made it. Several witnesses, however, testify to the extreme peril of the vessel, and to the small probability that, in her condition, and with any means which could be procured at that place, that she could be saved.

The master decided to sell her. She was sold at public auction, and bought by the claimant for \$1,750. He succeeded in getting her off at an expense of about \$250, and she was found not injured so as to prevent her making the voyage to New Orleans; and, after some repairs there received, she was brought to this port.

She was here arrested by the libellant, who asserts that the claimant acquired no legal title by the sale and purchase.

The law applicable to this subject is no longer open to doubt in this country.

The cases of *The Schooner Tilton*, (5 *Mason*, 465,) in *Robinson v. The Commonwealth Insurance Company*, (3 *Sumn.* 221,) *Anthony v. The Brig Henry*, decided in this Court in 1834,¹ and *The New England Insurance v. The Sarah Ann*, (13 *Pet.* 387; 5 *C. 2 Sumn.* 206,) clearly establish the authority of the master, as such, to sell a wrecked vessel, when he proceeds in good faith, exercising his best discretion for the benefit of all concerned, and in view either of existing peril, or of perils likely to ensue, from which, in the opinion of persons competent to judge, she cannot be rescued.

I do not now recapitulate the testimony, but it is strong and satisfactory to show that no reasonable hope could be entertained that the vessel, in her then situation, could be saved by use of any means belonging to her, or which her

¹ Since reported, 1 *Blatchf. & H.* 465.

master could procure at that place; for although there were numerous vessels of all sizes at anchor in the roadstead, at the time, yet the hazard to ships at that anchorage from the formation of the coast, and the suddenness and violence of northers, demands the constant command, for their own protection, of all the anchors and tackle they are usually supplied with.

Anchors, cables, and floats were the essentials requisite for the relief of vessels wrecked and buried in the sand there, and witnesses of long experience at that port testify that little or no chance exists for procuring them on hire in aid of a wreck.

It is ordinarily, therefore, only by sale of wrecks to those making it a business or speculation to recover them, that any thing can be reasonably hoped to be saved for the owners, when vessels become disabled and unnavigable in that region of country.

In the cases cited, the courts consider and dispose of the suggestion that the master is bound to exert himself to save his vessel, when she is not so desperately circumstanced but that bystanders are prepared to purchase her, and are able to get her off; and although it is reurged here, nothing can be added to the force of argument by which it is repudiated by the Circuit and Supreme Courts. *The New England Insurance Company v. The Sarah Ann*, 2 *Summ.* 206; S. C. 13. *Pet.* 401.

The answer of the claimant is relied upon as distinguishing this case in an important feature from those cited, as it admits that he would not have bid for her unless, in his opinion, there was a reasonable prospect of getting her off. But it is to be observed that this is the answer of the *purchaser*, and not of the master; proof that the master believed he could rescue his vessel with the means he had at command would be pertinent to show the sale was without good faith, and to prevent any title passing under it. But no such effect can be given

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to the motives and judgment of the buyer. Of course, he acts under the persuasion that he may be able to save the wreck.

Neither is it of any effect upon the validity of the sale that the loss of the schooner occurred through the culpable negligence of the master, in leaving her to encounter the gale without a sufficient crew on board, and for objects of private adventure and profit. The buyer is not bound to inquire further than to ascertain the danger of her position on shore, and the propriety of her sale, and he can be no way made chargeable for antecedent misconduct, or want of skill or prudence in the master.

Mal-conduct and bad faith in the master in the sale is charged upon the evidence of the first mate, that the master had purchased a wrecked vessel, which was anchored near the schooner, on board of which he had an anchor of his own of sufficient weight to have enabled him, with the force at his command, to haul the *Lucinda Snow* out of the sand in which she was imbedded. It is insisted he was bound to use the anchor for that purpose.

It may well be doubted, upon the whole proof, whether that single anchor would have been an adequate support to the force necessary to draw the schooner off the bank the distance she had been driven on shore; but the conclusive answer to the argument is, that the master was not bound to deprive his own vessel, which was held by that anchor, of her security, in order to attempt the relief of the schooner. Had it been proved he had in possession or control an anchor of that kind, not employed with or necessary to another vessel, it might be proper to consider upon the evidence whether it was a neglect of duty on his part to omit the use of that means to save the schooner, so palpable as to be notice to the purchaser that the sale was without authority; or whether the chances of success, with such light assistance, would not be so remote as to justify his resorting to a sale, notwithstanding the possession of such aid.

The earlier English authorities no doubt demanded the existence of a case of *extreme* necessity, an *imperative*, an *overwhelming* necessity to justify the master in selling. *Abbott on Shipp.* 9, 12.

Chancellor Kent evidently favors that doctrine, and seems inclined to exact the highest degree of necessity to uphold a sale made upon the sole authority of the master. 3 *Kent*, 173. These epithets are exceedingly indefinite and uninstructional; for, notwithstanding their intensity, it was never asserted that the situation of the vessel should be *desperate* to authorize a sale by the master. This would be to hold that she could only be sold either as fragments or after the loss was absolutely total.

The Supreme Court of the United States, in the case already cited, removes the ambiguity of the epithets *extreme*, *supreme*, &c., and gives precision to the rule, by placing this requisite of *necessity* as an element in the power of sale, on a footing both reasonable and practical.

To render a sale valid, in a case of stranding, to pure good faith in the master is to be united the *necessity*, "to be determined in each case by the actual and impending peril to which the vessel is exposed, from which it is probable, in the opinion of persons competent to judge, that she cannot be saved." The master must collect the best information his situation and the urgency of the case may admit, in respect to the actual condition and injury of his vessel,—the character of her exposure in that situation,—and the known and probable means he may command for her relief; and then, if his honest opinion concurs with that of competent judges, whom he may have opportunity to consult, his power to sell is not only complete, but the *necessity* then becomes an urgent *duty* upon him to sell for the preservation of the interest of all concerned. *The New England Insurance Company v. The Sarah Ann*, 13 *Pet.* 400.

Chancellor Kent concedes this to be the now settled doc-

The *Lucinda Snow*.

trine on this subject. 3 *Kent*, 6th ed. 174, note; *Smith on Merc. L.* 171, note. Judge Story states the rule in perhaps broader phraseology; (3 *Sumn.* 249,) but the principle is compressed and made definite in the decision of the full bench. 13 *Pet.* 400; 2 *Story*, 479.

It is argued that the large sum bid for the vessel proves, that in the judgment of those attending the sale, she was not in imminent peril. There is, no doubt, force in the suggestion, but it is merely a speculative one—no witness testifying to a belief she was worth so much—and it is to be weighed in connection with other considerations notoriously acting at such sales. The spirit of competition and even bravado, are apt to mingle with and influence a course of public biddings, and whilst courts may, perhaps, properly indulge in the speculation that bystanders, awake to their own interest, will not permit vessels or property to be so acquired at wholly inadequate prices, (The *Sarah Ann*; 2 *Sumn.* 206,) even such conclusions would very slightly uphold the presumption that at a brisk auction the biddings might not largely exceed the fair value of the articles on sale.

In the present case it would certainly be more satisfactory to have evidence of efforts made by the master to obtain assistance, and the testimony of persons applied to or who knew his exertions in that behalf, than to be left to decide the case upon the opinions and judgments of witnesses, all of whom, except two, (and those two standing in a good degree in direct conflict in their statements,) without personal knowledge of the acts or efforts of the master, or, as matter of fact, of the actual difficulties and impediments to his getting off the vessel, or obtaining the necessary aid to do it.

It is to be remarked, that Thompson, the mate, whose evidence is relied upon as impeaching the conduct of the master, stands in material contradiction with himself in his sworn protest and the deposition given in this cause, and that the master died at Vera Cruz soon after the sale, so that the now

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claimant cannot have the advantage of his instructions to supply proofs of his motives and conduct; and I am not disposed to introduce into this case a rule more rigorous than any heretofore indicated by the courts, and to hold that a purchaser, to maintain a title under a master's sale, must furnish direct and positive evidence of the honesty of the master's conduct and the necessity of the sale. The implied and presumptive proof to that point, in my judgment, in this case, is sufficient and satisfactory.

I shall accordingly hold that the claimant has made out a sufficient and valid title to the vessel, and that the libel must be dismissed.

 ONE HUNDRED AND NINETY-FOUR SHAWLS.

It rests in the discretion of a Court of Admiralty whose aid is invoked to the settlement of a controversy between *foreigners*, to hear and determine it, or to remit the parties to their home forum.

There is no authority of weight which imposes on the courts of our own country the necessity of determining controversies between foreigners resident abroad, either in common-law proceedings, transitory in their nature, or in maritime suits prosecuted *in rem*.

As a general rule, where the only question in a salvage suit is as to the rate of reward, and the salvaged property is within the jurisdiction of the Court, a Court of Admiralty, in this country, will entertain the suit, notwithstanding that all the parties are foreigners.

It seems, that when in a salvage suit between foreigners, the answer charges the libellant with wanton misconduct in obtaining possession of the property, and prays the privilege to contest the claim of the libellant before the courts of their common country, the case should be dismissed to the home forum.

What considerations will govern a Court of Admiralty in determining to exercise or decline jurisdiction of a suit between foreigners?

THIS was a libel *in rem*, filed by Thomas Crowell and others, the owner, master, and crew of the bark *Reliance*, against One Hundred and Ninety-four Shawls, and certain

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other articles salvaged by the libellants from the wreck of the *Lady Kenneway*, to recover salvage compensation.

The *Reliance* was a British vessel, owned in Liverpool. The libellants were all of them British subjects and residents, and the crew of the bark were all shipped for the voyage during which the salvage for which compensation was now claimed was effected, under British articles.

The leading circumstances upon which the claim to salvage compensation was based, were, according to the statements of the libel, as follows: The bark *Reliance* left Liverpool on November 1, 1847, bound to New York, and ultimately back to Liverpool—having a crew of nineteen men and five boys, and being laden with a cargo of iron and salt, and having on board, also, about 280 passengers.

On the 16th of November she fell in with the *Lady Kenneway*, as alleged in the libel, in latitude $44^{\circ} 54'$, and longitude $9^{\circ} 54'$, on soundings, near the coast of England, and boarded her at mid-day. The wind was light, and the weather, at the time, mild. No person was found on board. The rudder of the *Lady Kenneway* was gone, and she had five feet water in her hold, but otherwise she appeared staunch and sound. Another British brig was found lying off near her at the time, and a boat's crew from that vessel came on board whilst the libellants were there, and took away a boat load of her cargo, but refused to give the name of their vessel.

The *Lady Kenneway* was a British East Indiaman. She was owned in London, and was on a voyage from Bombay to London, laden with a cargo of shawls, silks, coffee, rice, and arrowroot.

The mate of the *Reliance* offered to take the *Lady Kenneway* into port, with the aid of a small crew, but the master of the *Reliance* considered that it was not advisable to attempt her salvage with his own vessel or crew, and ordered to be taken from her to his vessel several cases, which were found to contain 194 shawls; there were also so taken some pieces

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of silk, portions of the sails of the vessel, of her tackle, provisions, and ship's stores, &c. After being engaged in that service three or four hours, the libellants abandoned the vessel, leaving the British brig near her, and continued their voyage to New York, where they arrived on December 1, 1847.

The *Lady Kenneway* was subsequently taken into Portsmouth, England, but who were the salvors did not appear upon the proofs in this case.

On the 22d of December, the first libel was filed in this Court against the chief part of the articles brought from the *Lady Kenneway*; on the 24th a supplemental bill was filed, specifying various other articles omitted in the first.

On the 30th of November, the British consul, by leave of the Court, intervened in behalf of the unknown British owners, praying the Court to order restitution for their benefit of the property attached, after allowing the libellants a reasonable salvage, if, in the judgment of the Court, "they proved a case of derelict, and their consequent right to salvage."

On January 3, 1848, an appearance and claim was entered in behalf of Arbutnot, Evart & Co., of Liverpool, for forty shawls, parcel of the one hundred and ninety-four taken out of the *Lady Kenneway*.

On March 28, 1848, Frith, Sands & Co., of Liverpool, by leave of the Court, filed their claim to sixty-six of said shawls; and on June 8, 1848, John Bibby & Sons, of Liverpool, in like manner filed their claim to fifty-one of said shawls.

No claims were interposed by owners for the residue of the property under attachment in the suit.

The individual claimants, as well as the consul, set up defences against the award of salvage, charging that the libellants embezzled portions of the goods taken out of the *Lady Kenneway*, and committed waste, damage, and destruction of the apparel and stores of the vessel whilst on board of her.

The claims and answers also insisted that the libellants

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had no rightful authority, under the circumstances, to remove from the vessel the portion of her cargo taken away.

The answers and claims of Frith, Sands & Co., and of John Bibby & Sons, furthermore insisted that the Court should decline jurisdiction in the case, because the *Lady Kenneway* was an English vessel, then on a homeward voyage, with her cargo for an English market, and the *Reliance*, at the time, was an English vessel, with a British crew on board, who had signed British articles, and that accordingly both vessel and libellants were bound to return to terminate the voyage at a British port.

On March 7, 1848, an action by the United States against the master of the *Reliance*, for a penalty of \$400, for landing in this port some of the said shawls without a permit, was tried in this Court; and on the 22d of March a like action against the carpenter of the vessel, for a like offence, was also tried, and by written stipulation between the proctors of the libellants and of the claimants, the testimony given on those trials was received as part of the proofs in this cause. Each of the parties, also, put in voluminous documentary proofs upon the issues involved.

Phillip Hamilton and *W. Q. Morton*, for the libellants.

Charles Edwards, for the claimants.

BETTS, J. An objection is taken by the claimants to the mode of proceeding adopted in this cause, which is deemed by them to be of great importance in its bearing upon the merits; as is also the omission in the original and supplemental libel of any averment that the master of the *Reliance* entered in his log a full specification of the articles taken by him from the *Lady Kenneway*. The conclusion to which the Court has arrived upon another branch of the defence will, however, render it unnecessary to consider those points.

I have carefully examined all the proofs in the cause, as well those taken originally in this action as those introduced by

stipulation from the suits prosecuted on behalf of the United States, in order that I might satisfy my mind whether the libellants had established a case of manifest justice on their part; and whether the property under arrest was so circumstanced as to render it important to all interested in it, that this Court should determine to what extent it was chargeable in behalf of the libellants; or whether, in order to insure the ultimate realization of its value to those concerned, it was advisable that the Court should decree its sale; for I regard it as resting in the sound discretion of the Court, on all the facts and circumstances of the case, to exercise or decline jurisdiction over the property arrested.

As a general principle, the citizens or subjects of the same nation have no right to invoke a foreign tribunal to adjudicate between them, as to matters of tort or contract solely affecting themselves. It rests in the discretion of the Court, whose authority is invoked, to determine whether it will take cognizance of such matters or not.¹ *Rea v. Hayden*, 3 *Mass.* 24; *Gardner v. Thomas*, 14 *Johns.* 134; *Johnson v. Dalton*, 1 *Cow.* 548; *The Courtney*, *Edw. Adm. R.* 239; *The Madonna*, 1 *Dods.* 37. The last two cases in Admiralty proceed upon the same doctrine, although maritime courts will probably exercise a discretion in support of actions between foreigners, upon a broader view of collateral equities than would be entertained by courts of law. *The Jerusalem*, 2 *Gall.* 191.

As maritime courts proceed upon a common rule of right and compensation in salvage cases, the question of jurisdiction in that class of actions will seldom be raised or regarded before them.

The courts will take cognizance of those cases as matters

¹ See, also, upon the subject of jurisdiction over foreigners, the case of *Davis v. Leslie*, *ante*, 123; *The Infanta*, *ante*, 263; and *Bucker v. Klorkgeter*, decided in January, 1849, and reported *post*, in its order.

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of course, if either party is territorially within the jurisdiction of the Court; and the property being brought within their jurisdiction, although the salvors and claimants may be citizens or subjects of different nations, the Court will unhesitatingly dispose of the subject, if satisfied that the whole right is before it,—salvage being essentially a question of the *jus gentium*. The Two Friends, 1 Rob. 234; The Blaireau, 2 Cranch, 248.

In The Jerusalem, (2 Gall. 191,) Judge Story maintains strenuously the propriety of Admiralty Courts taking cognizance, it would seem, of all actions *in rem*, although foreigners are solely interested, whenever the *situs rei* under contestation is found within their territorial authority. But his reasoning still moves within the qualification that the Court, having the legal capacity to adjudicate in such matters, is not bound to remit them to the forum of the litigant parties.

Guarded by that limitation, the rule may be serviceable to the navigation and intercourse of commercial nations, and be of convenient and wholesome application.

I find no authority of weight which imposes on the courts of our country the necessity of determining controversies between foreigners resident abroad, either in common-law actions, transitory in their nature, or maritime proceedings when the remedy is *in rem*.

If the doctrine were peremptory, imparting to suitors the right to such aid, and imposing on courts the obligation to afford it, actions for supplies and materials, on charter-parties and bills of lading, or by mechanics for labor, would be comprehended within the class, equally with suits for wages on bottomry bonds or for salvage compensation.

I am satisfied the law is not so. In my judgment it would be lamentable if courts were compelled to defer the business of the citizens of the country to bestow their time on litigations between parties owing no allegiance to its laws, and contributing in no way to its support.

Should it transpire, in the progress of the litigation, that the law of the domicile of the parties must be ascertained in order to adjudge rightly on their claims, or that witnesses must be examined there to fix the facts in controversy, the Court might be compelled to suspend its movement, and wait until these cardinal particulars could be supplied from abroad, Every tribunal experiences the inconvenience and unsatisfactoriness of so settling controversies between those even who can have no other means of redress, and will recognize the value of the principle which enables them, in regard to foreigners, to remit their controversies to their home tribunals, where the law is known, and the facts can be more surely determined.

This Court has, in repeated instances, acted upon this acceptation of the law ; and believing it to be the sound and safe rule, I shall adhere to it in all cases authorizing that exercise of discretion.

The question to be considered is, whether, in this case, the rights of parties would be best promoted by retaining the case and disposing of the subject here, or by remitting it to the home courts of the salvors and claimants.

The answer advances many grave imputations against the conduct of the master and seamen on board the wreck, and after the property came into their possession, and these charges are not without color of proof to support them. Their case does not, accordingly, come before the Court with the most persuasive claims to its interposition and favor. When salvage services are eminently meritorious, and the only inquiry to be made is the rate of reward to be allotted, Admiralty Courts would be solicitous to give every practicable dispatch to suits by the salvors, and relieve them both from delay and expense in obtaining their just reward. It would scarcely occur that any court would withhold its aid from such suitors.

It is quite different when the foreign owner of the property

charges his fellow-subject with embezzlement and spoliation, and other wanton misconduct in respect to it, and prays the privilege to contest his claim to compensation before the authorities of their common country.

Independent of that aspect of this case, it is attended by other particulars most proper to be inquired into and adjudicated by an English court, and which could hardly be fitly appreciated or justly disposed of by a foreign one. There are several of these particulars :—

1. The application and effect of certain provisions in two acts of Parliament in relation to salvage services.

The claimants supposed this transaction within the provisions of the act of 1 & 2 Geo. IV. ch. 75, and that the master of the *Reliance* had acted in direct violation of section 13 of that statute.

It had escaped the notice of the advocates that the acts of 9 & 10 Vict. c. 99, § 2, repeals the former statute.

The latter act has been closely criticized by English writers, because of its unskilful and somewhat confused enactments; (*Law Mag.* Feb. 1847, art. 2;) yet section 30 would seem, notwithstanding, to embody substantially the provisions of section 13 of the act of 1 & 2 Geo. IV. At all events, it more appropriately belongs to the English judiciary to settle its meaning, and determine whether the master of the *Reliance* has acted in violation of the directions of the statute; as also what were his obligations by the local law, under the circumstances, in regard to the wrecked vessel or her cargo.

If that statute applies to this transaction, then there is a further and urgent reason for referring the whole matter to the English courts, because the master would, by the provisions of the act, be subject to a penalty of £100, and double the value of the goods taken by him, for failing, on the return of his vessel, to bring before the Commissioner of Salvage or the High Court of Admiralty, the property removed from the *Lady Kenneway*.

2. The *Lady Kenneway* was, shortly after the libellants left her, saved and taken into England. Most intimately, if not necessarily connected with the manner and merit of the salvage of the vessel and the appropriate reward for it, must be that also of the salvage of the cargo, whether made by one or different sets of salvors. *The Emma*, 2 *W. Rob.* 315.

3. The termination of the voyage of the *Reliance* was in England, where it is to be presumed she would arrive within a short period after leaving this port, and it is most fitting that the question of the obligations and privileges of her master and crew, in respect to services rendered a British vessel, a wreck or in distress on the English coast, should be determined in the courts of that nation.

4. The shawls taken from the wreck were of great price, composing the chief value of all the property removed to the *Reliance*. It was found on the trials before referred to, that these articles were essentially adapted to the English and European market, and were comparatively unsalable in the American market. They were transshipped from a vessel bound to London, and near her destination, and it is a question of deep import, which cannot be evaded in the decision of the cause, whether the conduct of the master of the *Reliance*, in transporting such a cargo, situated as he found this, to a distance so remote from its proper and available market, was excusable; and even if excusable in law, whether he can found upon it a claim to remuneration as for a meritorious salvage.

Not only is this question itself more suitably addressed to the consideration of an English than an American court, but an ingredient for its just disposition not in the case before me, must necessarily be brought to the attention of the tribunals there—the actual condition of the *Lady Kenneway* at the time, and the facility or delay the *Reliance* would have incurred in saving her, in the estimation of her salvors, or of persons who visited her after she had been deserted.

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Other particulars in the case, of no unimportant influence, might also be referred to, but enough have been stated to satisfy my judgment that the exercise of a sound discretion requires me to dismiss this prosecution, and remit the property and cause to the proper forum in Great Britain.

A decree will accordingly be entered, discharging the property from arrest, each party to pay his own costs in this Court, except that in respect to the British consul, who intervened officially in protection of the rights of absent and unknown owners, his taxable costs are to be paid before the order for delivering up the property is executed. It will be manifest from the face of the order, that the payment of these costs is compulsory, and by authority of the Court having possession of the property, and as a condition to its surrender; and it will doubtless be a document which may avail in evidence before the British tribunals, and be there regarded in the final award of compensation and costs between the libellants and the owners of the property.

I regret that other engagements in the Circuit Court, and in the business before this Court having precedence of this cause, have delayed the disposal of the case much beyond the period usual in these courts, after a hearing is completed. But as the property is not in its nature perishable, it is presumable that no other consequence has resulted from a delay of six weeks, than an inconvenience to the parties; to the one in having the reward they may be entitled to deferred, and to the other in losing for the time the use or proceeds of the property.

As the libellants may not reclaim the property attached in their behalf, the decree will make provision enabling the claimants who have intervened in their own right, and the British consul in behalf of unknown owners, to take the goods out of Court and ship them to their port of destination.

Decree accordingly.

The Infanta.

THE INFANTA.

The requisites of a valid stipulation in Admiralty considered.

An irregularity of practice must be objected to by the party affected by it, within the term of the Court next subsequent to its becoming known to him.

A defective execution of a stipulation will be deemed waived unless excepted to before the close of the term next after the opposite party has notice of the defect. This rule is strictly observed in the case of stipulations given in behalf of seamen.

Two libels *in rem* were filed by seamen against the bark Infanta—the one by Robert Wood, the other by George States—both to recover wages.

The causes were brought to final hearing together in April, 1848, (see *ante*, 263,) and the Court then decreed that the libels be dismissed with costs. The final decrees therein were perfected early in May following. The libellants thereupon appealed to the Circuit Court. Motions were now made in behalf of the claimant that the appeals be dismissed, or the libellants be required to execute new stipulations upon the suits pending in Court unexecuted, before the appeals should be allowed to take effect.

The motions were founded on two alleged irregularities on the part of the libellants, in putting in and perfecting their stipulations under the rules of the Court, on entering their appeals.

1. That only one surety was given, and that each libellant was a non-resident of this district, and did not himself sign the stipulation.

2. That justification by the stipulators was taken in surprise of the claimant's proctor, and at a time different from the one appointed for the purpose.

J. Larocque, for the motion.

Wm. Wordsworth, opposed.

The Infanta.

BETTS, J. In suits in the Admiralty Courts, each party is required to give security *apud acta*, in open Court, or by bail or stipulation out of Court, on initiating an action or defence. *Dist. Ct. Rule*, 44; *Sup. Ct. Rule*, 5. This proceeding was attended with much formality under the ancient practice, and became a branch of critical learning, and of no inconsiderable perplexity. The topic is ably investigated by Judge Ware, in *Lane v. Townsend*, (1 *Ware*, 286, and note,) and the methods pursued are pointed out in *Clarke's Praxis*, tit. 4-12; 2 *Browne's Civ. & Adm. L.* 356. The subject is now one rather of curious inquiry than of practical importance in this Court, because it is here fully regulated by the standing rules of this and the Supreme Court, at least in so far as the points arising under these motions are concerned. To effectuate the appeal so as to suspend execution on the decree in this Court, it was necessary for the libellants to give security by stipulation within ten days after the decree was rendered, (*Dist. Ct. Rule*, 153,) and also to serve upon the claimant four days' notice of the names of the sureties proposed, and of the time and place of giving the stipulation. *Rule* 154. The libellants, if resident within the district, must execute the stipulation personally, with at least one surety resident therein. Non-resident parties must supply at least two sureties. *Rule* 59. This seems to be the usual course of practice in the American Courts of Admiralty, and the formal steps for carrying out the regulations are indicated in the elementary books. *Dunlap's Adm. Pr.* 155, 156; *Betts's Adm. Pr.* 25, 26.

The allegation set forth in the papers, upon which this motion is founded and attested to on the part of the claimants, are contradicted and repelled by the greater weight of evidence given in behalf of the libellants, except that both libellants are not proved to have been residents of this district at the time the stipulations were executed. They were transient

seamen, employed backwards and forwards in voyages between New York, the West Indies, and Portland in Maine.

The sole defect or irregularity established by the proofs, then, is that two sureties were not furnished in the stipulations objected to.

All the proceedings excepted to by the claimant took place with his full knowledge in May last, but he has forborne applying for relief against the alleged irregularities until the present term of July.

It is the settled practice of this, and it is believed of all other Courts, that irregularities of proceeding, known to the party concerned, must be objected to at the first legal opportunity in Court, after the time of its occurrence. If the fraction of the May term remaining after the steps had been taken by the stipulators to justify their sufficiency might be disregarded by the claimant, yet he was bound to make his objections to the stipulations at the June term, or he will be held to have waived all exceptions to matters of irregularity.

One surety is sufficient in the stipulations, where the principal is a resident within the district, and it is not indispensable to the validity of a stipulation in any case, that it be executed by two sureties. It is a privilege of the party, which he may enforce or not, at his option. *Dist. Ct. Rule, 59.* It would be grossly inequitable to suffer the claimant to stand by and witness the signature of the stipulations by one surety only, without objecting to it, and subsequently permit him to vacate the act for irregularity. The signatures of two sureties are not vital to the stipulation. It is a formality only, which the opposite party may waive, and which, under the facts, the Court will deem him to have done in this instance. This would be done on general principles; but there are additional reasons why the most liberal intendments and presumptions should be applied in favor of seamen, to uphold their acts, and prevent sharp practice to their disadvantage, in litigations for the recovery of their wages. The claimant

The *Indiana*.

may have now selected a time to exact their present execution of the stipulations, when they are absent on foreign voyages, and their present inability to fulfil that formality might bar their seeking relief by appeal from the decisions made in this Court against their demands; and the addition of their names to the stipulations may usually be regarded as the emptiest formality, for it is not to be supposed that the personal responsibility of men of their class can supply any aid to the obligations, or any pecuniary advantage to the claimant. Independent of the laches of the claimant, in delaying his application to the Court for a period of six weeks after notice of this informality, if it be one, I hold that the claimant must be deemed to have intentionally waived the execution of the stipulations by the libellants. The motions are accordingly both denied.

Order accordingly.

THE INDIANA.

Where a collision occurred at night between a steamboat under way and a schooner at anchor in the middle of the Hudson River, opposite Fort Lee,—*Held*, that the taking up an anchorage in the middle of the river was not an act of culpable conduct on the part of the schooner.

It seems that there is no settled usage among those navigating the Hudson River, which requires vessels anchoring over night to take up a position within any particular limits as respects the shore; nor any usage justifying a steamboat making a night trip, in dispensing, while running in the middle of the river, with any care or precautions to avoid collision, which she would be bound to take if running near the shore.

The failure to keep out a good light during the night, and the failure to maintain a sufficient watch on deck, are either of them acts of culpable negligence, which will prevent a vessel from recovering damages for a collision.

THIS was a libel *in rem*, by Joseph W. Sawyer and others, owners of the schooner *Egremet*, against the steamboat *Indiana*, to recover damages for a collision.

The facts in the case were, that at about four o'clock one morning, the night being dark and foggy, the schooner was at anchor in the North River, nearly opposite Fort Lee. The steamboat was, at the same time, on her way down the river from Albany, having six canal boats in tow, two on each side and two behind. The pilot of the Indiana saw the schooner a few minutes before striking her, and endeavored to go clear; but there being a strong ebb tide, it was not possible to do so, and the outside canal boat on the starboard side struck the schooner, doing considerable damage.

The ground of defence was, that there was negligence on the part of those in charge of the schooner, which contributed to the accident. The facts relied upon as showing this negligence are stated in detail in the opinion of the Court.

E. C. Benedict, for the libellants.

C. Van Santvoordt, for the claimant.

BETTS, J. The libellants having established a right, *prima facie*, to compensation for the injuries received in the collision articulated upon, the case rests upon the sufficiency of the defence made on behalf of the claimant.

That defence specifies three acts of the libellants which, it is contended, were wrongful under the circumstances, and operated to cause the collision, without fault or negligence on the part of the claimant.

Those facts are the following:—

1. That the schooner was anchored, in a thick, dark night, nearly in the middle of the river, in the ordinary route and channel of steam vessels passing up and down the river.
2. That no light, proper and sufficient to warn approaching vessels of the position of the schooner, was exhibited upon her at the time of the collision.
3. That no watch was kept on her deck at the time.

It is contended, that owing to these acts of culpable negligence, those in charge of the steamboat were prevented from

The Indiana.

discerning the schooner until so near her as to render it impossible to avoid the collision.

So far as respects the character of the weather and the position of the schooner, the evidence upon both sides is in substantial harmony. For although some of the testimony introduced on behalf of the libellant charges that the night was so dark that no vessel could be safely navigated, yet the weight of evidence on that side, in concurrence with all the testimony offered for the claimant, is to the effect that it was proper and safe, on the night in question, for steam vessels to run, inasmuch as the land on each side of the river could be seen. And although there was a slight disagreement amongst the witnesses as to the position of the schooner—the claimant's witnesses stating that she lay "in the middle of the river," and the witnesses for the libellant saying that she was "a third or more of the width of the river from the east shore,"—yet the discrepancy is too slight to embarrass the Court in applying to the case the rules of law governing cases of a similar kind. For the assertion of the pilot of the Indiana, that the position taken up by the schooner was an unusual one for vessels to anchor in, is not contradicted by any evidence upon the other side.

These facts, then, are established by the pleadings and proofs. That the wind was northeast, and the tide a strong ebb. That the schooner lay at anchor wide off in the river. That the night was so thick and dark, that an object of the size and color of the schooner could not, without the aid of a light on board of her, be discovered by those on board of a steamboat running on the same track, at a distance of more than ten or fifteen rods off. That the position thus taken up by the schooner was one far out in the river, there a mile or more in width, and at a place where steamboats were not bound to exercise extraordinary circumspection or precaution in expectation of coming upon vessels at anchor.

In respect to that charge of negligence on the part of libel-

lants, which is based on the position selected by the schooner for anchoring, the rule applicable to such cases requires the promovent to show that there was positive fault or negligence on the part of the colliding vessel, and that there was no blameable conduct in the one injured, conducing to the collision. The utmost that is made out by the claimant is, that the choice of the place where the schooner anchored might possibly have led to the accident. There is no evidence that any fixed understanding exists amongst navigators on the Hudson River, to the effect that vessels will not anchor out towards the middle of the river, even at points where it is of such great breadth ; nor any proof that it is the invariable or even the most usual course for steamboats to hold a course directly midway the river during the night time. I do not think, therefore, that this case can be ranged with those where vessels are guilty of culpable negligence in anchoring in the common passages of great thoroughfares. After leaving the immediate harbor of New York, and particularly in those parts of the North River where there is a navigable channel of a mile or more in width, there does not seem to be any rule, or any necessity, compelling vessels to confine their anchorage within any particular limit, or excusing those under way in one part of the channel from exercising the ordinary precaution and vigilance which might be required from them in another part.

The charge of negligence, in not keeping a light conspicuously suspended on the schooner, is better founded. Both the statute law of the State and the equally stringent rule of the maritime law, require a vessel at anchor, under such circumstances as are shown in this case, to maintain a good and sufficient light throughout the night, so placed as to be visible to other vessels approaching her from any direction.¹

¹ Compare, also, *The Santa Claus*, *Olcott*, 428.

The Indiana.

1 *Rev. Stats.* 685, § 2; *Train v. The North America*, 2 *N. Y. Leg. Obs.* 67; *Simpson v. Hand*, 6 *Wheat.* 324; *Bullock v. The Steamboat Lamar*, 8 *Law Rep.* 275; *Waring v. Clarke*, 5 *How.* 441. And the testimony on the part of the claimants is full and satisfactory to show that no light on the schooner was discernible from the steamboat, either before or at the time of the collision.

This evidence is given not by the pilot and other persons on board the steamboat alone, but by others on the canal boats in tow alongside her. The witnesses all assert that they were on a vigilant look-out,—the alarm-bell of the steamer having been rung,—and that they saw a few rods ahead a dark object on the water, but no appearance of a light upon any part of it.

It is proved, by those on board of the schooner, that a globe lamp was trimmed and lighted, and properly set, at about eleven o'clock that night, and that at the time of the collision it remained in the same place, still lighted, and was taken down and used in searching for the damages she might have received. The pilot, however, adds that the wick was found crusted thickly, and he picked the wick before hanging it up again.

After the two vessels were separated, the steamer passed down the river, but returned a short time subsequently to put back upon the schooner one of her crew, who had got on board the steamer during the collision. On that occasion the light of the lamp was plainly seen by those on board the steamer, in season to give them notice of her proximity in ample time to avoid a collision. This circumstance is urged, on the part of the libellants, to show that the lamp had all the time given sufficient light to warn the steamer where the schooner lay; while it is, on the other hand, invoked by the claimant, as evidence that the re-trimming of the lamp was necessary to render it of any service to other vessels approaching her.

The Indiana.

I think this particular is not sufficient to countervail the strong proofs furnished by the claimant of the absence of any light exhibited on the schooner at the time of the collision, competent to afford warning to the steamer of her position. The light probably continued feebly kindled and burning too obscurely to give more light than enough to show the men, as they came on deck, that the wick was still ignited; and even that effect might well be produced from the jar of the two vessels in the collision, shaking up or resuscitating slightly the flame.

The weight of evidence, in my opinion, is against the libellants upon this point, and fastens the fault on them of having failed to keep up, burning during the night, a clear light, placed conspicuously on the vessel.

The omission of the libellants to maintain a competent watch on deck throughout the night is clearly proved. That was an act of gross negligence on their part.¹ All hands on board the schooner turned in at about eleven o'clock in the evening. A look-out, doing his duty on deck, could have secured the schooner from the accident. He could have given the steamer timely warning, by hailing or by waiving a light, and especially would have acquitted the schooner of fault in respect to a standing light on the vessel, by seeing that the lamp was kept in proper condition, and furnished the light required by law. Aside from the positive duty to maintain such a light, enjoined by the local statute, these acts of omission are made by the maritime law evidence of culpable inattention and want of precaution, which bar the schooner of all claim to damages she may have suffered in consequence of the neglect.

The libel must therefore be dismissed, with costs to be taxed.

¹ Compare, also, *The Rebecca*, 1 *Blatchf. & H.* 347.

The Washington Irving.

THE WASHINGTON IRVING.

A collision occurred in the day time, between a sailing vessel sailing on her star-board tack, on a flood tide, and a steamboat; for which a libel was filed on the part of the vessel.

Held, 1. That it was incumbent on the steamboat to show some improper act or omission on the part of the sailing vessel, causing the collision, or it would be presumed that the steamboat neglected to use those precautions to avoid collision which the law required her to exercise.

2. That in order to protect the steamboat, such excuse must be set forth clearly in the answer of the claimants, and must be proved as laid.

When a steamer and sailing vessel, proceeding in opposite directions, are approaching each other on courses which may lead to a collision, the steamer cannot be excused for holding her way, upon the hypothesis and belief that the sailing vessel cannot with safety to herself keep her tack, but must go about or come into the wind before they meet.

The law casts upon the steamer the obligation of using effectively and promptly the extraordinary means she possesses to prevent a collision.

Where the defence in the answer, in a cause of collision between a schooner and a steamboat, rested on faults imputed to the schooner in holding her course across the bows of the steamer under circumstances in which it was her duty to have gone about; and the defence set up by the proofs rested upon faults committed on the part of the schooner in an attempt to come about abruptly, and falling off or drifting in the attempt, against the steamer,—*Held*, that the latter defence was a deviation from the answer; and that under the pleadings the claimants were not entitled to the benefit of it.

THIS was a libel *in rem*, by Joseph Odell, owner of the schooner Superior, against the steamboat Washington Irving, to recover damages for a collision between the two vessels.

The facts appear sufficiently in the opinion of Court.

William Jay Haskett and *W. Q. Morton*, for the libellant.

J. W. C. Leveridge, for the claimant.

BETTS, J. The collision upon which this action is founded occurred in Hell Gate, near the Westchester shore of the East River, in the day time. The libellant's schooner was sailing eastward on a flood tide into the Sound, and the steamboat

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was running to New York, crowding close in by the shore of Ward's Island, in slack water, or what was regarded an eddy of the tide. The wind was N. E., and the schooner on her starboard tack from the Pot Rock across toward Negro Point, and in plain view of the steamboat. The starboard side of the schooner and bow of the steamer came in collision.

Under these circumstances it is manifestly incumbent on the steamer to show some improper act or omission on the part of the schooner causing the collision, or it must be presumed that the steamer neglected to use, in due time, the means at her command, and which the law required her to employ to avoid it.

The exculpatory defence must be pleaded specifically in the answer, and must be proved as laid, in order to protect the claimant.

In comparing the pleadings and proofs on this point, they are found not to harmonize, and the difference is essential in its character. The answer charges the whole fault to the schooner, and to have consisted in holding upon her starboard tack, into an eddy and across the bows of the steamer, when her true navigation was to have gone about, as, had she cleared the bows of the steamer, there would not have been room for the schooner to pass or lie between the steamer and the land; and further, by holding that course into the eddy tide, all control of her direction would be lost to her. Upon the assumption of the facts, the argument is cogent, that the pilot of the steamer had no reason to expect the schooner would undertake a movement so hazardous to herself, if not impracticable, and was not bound to take precautions against it, and rightfully continued on the course, which was the proper one, had the schooner been managed according to the usual and safe method of navigation under like circumstances.

There are important assumptions in this line of defence which are not confirmed by the proofs. First, that the steamer

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was at the time in an eddy out of the tide, where, for that reason, the schooner could not be expected to venture, as, without aid of the tide, she would not have sufficient steerage way to be worked about on the other tack before reaching the shore ; and, second, that there was not space between the steamboat and the shore to afford the schooner means of escape from bilging if she could be got past the bows of the steamer.

The officers of the steamboat had a right to act upon the presumption that the schooner would not be intentionally run in dangerous proximity to the shore, or to a point where she must become disabled or embarrassed in tacking by a loss or change of the current. But if these impediments to her course were not palpable and inevitable, the steamboat had no right to anticipate any variation of her course by the schooner, and was bound to regulate her proceedings so as to leave the schooner free to be navigated according to the judgment of her master and pilot. They were entitled to determine, at their discretion, the advantage or prudence of continuing her tack beyond the true tide, and even to what might seem to the officers of the steamer a dangerous proximity to the land.

The law, under circumstances of uncertainty or doubt in respect to these particulars, imposed on the officers of the steamboat the duty of taking timely precaution to secure the sailing vessel the free exercise of the discretion of her master in the choice of her course, and the expedients to be adopted in case he should encounter dangers in pursuing it. Had both vessels been under sail, the schooner being close-hauled, was entitled to run out her tack, or hold it so long as she deemed proper, if the opposite vessel was running free, and this privilege was still broader in respect to a steamer. Her pilot had no right to speculate upon the purpose or duty of the schooner, but, possessing the means and ample time, it devolved upon him to have avoided all hazard of collision by

stopping and backing her engine, or starboarding her helm and bearing off into the river, leaving space for the schooner to extricate herself in any manner she might elect.

But these various grounds and assumptions of defence are no way sustained by the proofs produced on the part of the claimant. They are wholly inapplicable to it. The scope and bearing of his testimony is to show that the collision was occasioned by an improper manœuvre of the schooner in luffing up into the wind so as to shake her sails, and thus misleading the pilot of the steamer by indicating the intention to bear off on the larboard tack, and then abruptly veering back upon her former course, when she had approached so near to the steamer that it was no longer in the power of her pilot to go astern of the schooner, or to prevent the latter being blown or drifted against the stern of the steamer.

This line of defence is not within the answer; it is a vital departure from it. It seeks to make an issue on merits outside the allegations of the pleadings. This the law and practice of the Court will not permit to be done.

In my opinion, the claimant entirely fails supporting the allegations of his answer, if they could be deemed in law an adequate justification of the acts of the steamer in the transaction complained of, and that the libellant is entitled to a decree condemning the steamer in the damages sustained by the schooner from the collision. It will be referred to a commissioner to ascertain and report those damages to the Court.

Decree accordingly.

Cox v. Murray.

COX v. MURRAY.

A Court of Admiralty has no jurisdiction to afford a remedy, either *in rem* or *in personam*, for the breach of an executory contract for personal services to be rendered to a vessel in port, in lading or unlading her cargo.

In order to clothe a contract with the privilege of a remedy in the Admiralty Courts, the subject-matter of the contract must be maritime in its nature. This is the case only when the matter done, or begun to be done under the contract, regards the fitment of the vessel herself for the voyage,—aid and assistance rendered on board her in prosecuting the voyage,—or the employment of her as the vehicle of a voyage.

THIS was a libel *in personam*, by Henry Cox against Richard Murray, to recover for services rendered by the libellant to the respondent.

The libellant was a stevedore. The respondent was master of the *Gem*, a British brig owned in Glasgow. The libel embraced several claims, among which was a demand of \$60 for the breach of a contract alleged to have been made by the respondent with the libellant as stevedore, engaging the services of the latter to stow a cargo of corn on board the respondent's vessel for shipment abroad. It was shown, however, that all the demands stated in the libel were satisfied by the respondent, excepting the one for damages for non-performance of that contract; and that no services were rendered by the libellant under the contract to load the vessel, beyond what he had received compensation for. The sole question upon which the case turned was, whether a Court of Admiralty can take jurisdiction of a suit for damages for the bare breach of a contract for services to be rendered in loading a cargo on board a vessel.

Alanson Nash, for the libellant.

J. T. Doyle, for the respondent.

BETTS, J. The libellant avers that he was employed by

the respondent to load and stow on board the brig Industry, commanded by the latter, a cargo of corn; and that he was afterwards unjustly discharged by the respondent, and prevented from doing the work, whereby he has been damaged to the amount of \$60. The respondent contests the amount of damages, and also objects to the jurisdiction of the Court over the demand. The inquiry as to the extent of damages sustained will be laid out of view, and the question of jurisdiction will alone be considered.

This being a foreign vessel, the remedy would, ordinarily, be concurrent either *in rem* against her, or *in personam* against the owner or master, when the subject-matter is one of maritime jurisdiction. The General Smith, 4 *Wheat.* 438. If that position be not accurate universally,¹ I do not consider the form of action in this case affords the libellant any advantage in respect to the question under consideration.

The decision of the cause does not rest upon the point contested between the advocates of the parties on the hearing—that is, the right of a stevedore to sue in Admiralty for services rendered by him in loading or unloading a vessel²—but upon a point widely different, viz., the competency of the Court to sustain an action or afford a remedy for a mere *breach of contract*, when no services have been rendered, nor any materials furnished, nor other acts of performance done under it, upon a vessel.

I understand the doctrine of the liability in Admiralty, of vessels or their owners to material-men and laborers, is based upon the consideration that the ship has been benefited and aided in her business of navigating the sea by the supplies or services furnished her. 4 *Wash. C. C. R.* 453. And I am

¹ See the case of *The Merchant*, *ante*, 1.

² That the services of a stevedore are not the basis of a lien upon the vessel, suable *in rem*, was decided in this Court, in *The Amstel*, 1 *Blatchf. & H.* 215, and in *The Bark Joseph Cunard*, *Olcott*, 120.

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not aware that maritime courts have ever sustained actions for personal services upon the footing of an executory contract merely. It may be a close question, whether a distinction may not exist, in respect to contracts of affreightment and others, which have relation to the use of a vessel in maritime employments, either by the owner or freighter, or to those entered into by mariners, which contemplate performance at sea, and thus assume, in most points, the strong similitude of a maritime character.

But a contract made in port, and intended to be there performed, to fit out, rig, or repair a ship, or to put on board necessary stores for a voyage, is not easily distinguishable in principle from the contract to furnish her a cargo; and I apprehend it would be difficult to fix upon any settled doctrine of maritime law which brings contracts of the latter description within the cognizance of maritime courts.

If suits can be maintained in Admiralty upon contracts where there has been no fulfilment, then, since the right of remedy should be reciprocal, the master or owner might resort to the same tribunal for the violation of agreements to build or repair a vessel, to supply her with stores, or to provide her with a stipulated cargo. The strong current of authority runs against the existence of any such powers in Admiralty Courts. *Willard v. Dorr*, 3 *Mass.* 91; *Plummer v. Hill*, 4 *Ib.* 380; *The Lady Horatio, Bee*, 170; *The Steamboat Orleans v. Phœbus*, 11 *Pet.* 175; *Andrews v. Wells*, 3 *How.* 372; *L'Arina v. Mainwaring, Bee*, 199; *Bains v. The Schooner James and Catherine*, 1 *Baldw.* 544; *The Crusader, Ware*, 437; *Bracket v. The Hercules, Gilp.* 184; *Davis v. A New Brig, Ib.* 473; *Thackarey v. The Farmer, Ib.* 524. Undertakings which are merely personal in their character, or which are preliminary and leading to maritime contracts, do not seem ever to have been recognized as within the jurisdiction of Admiralty. *Bracket v. The Hercules, Gilp.* 184; *The Schooner Tribune*, 3 *Sumn.* 144. The subject-matter of the

contract—the substantial object and end—must pertain to navigation, or be connected with transactions performed by vessels on the sea, to become maritime in its nature, and be clothed with the privilege of a remedy in Admiralty Courts; and it appears to me that an agreement acquires this maritime quality only when the matters performed or entered upon under it pertain to the fitment of a vessel for navigation, aid and relief supplied her in preparing for and conducting a voyage, or the freighting or employment of her as the instrument of a voyage. Collateral contracts with or assistance by services or advances to an owner or master, incidentally benefiting a voyage, acquire no special property thereby which renders them maritime.

The loading or stowing a cargo on board does not involve either of these fundamental ingredients of maritime service. This position was taken in the decision rendered in this Court in the case of *The Amstel*,¹ decided in 1831. The services of a stevedore in stowing or unlading a cargo, were there placed upon the same footing with those of a drayman who hauls it to the vessel or away from her. The stevedore's service is of no higher character, in respect to maritime privilege, than that rendered by any shore laborer who assists in pulling at the falls, or moving the merchandise along the wharf while the vessel is taking in or discharging cargo, or who aids in weighing or measuring it. The engagement entered into by a master with a stevedore, to employ the latter in such service, is of no higher quality than the service itself, and cannot, therefore, afford foundation for an action in Admiralty, either *in rem* or *in personam*. I therefore pronounce against the jurisdiction of the Court over this demand.

Decree accordingly.

¹ Since reported, 1 *Blatchf. & H.* 215.

Ringold v. Crocker.

RINGOLD v. CROCKER.

A seaman is entitled to be cured at the expense of the ship, of sickness, hurts, wounds, &c., incurred in the service of the ship.

The phrase "service of the ship" is not confined in meaning to acts done for the benefit of the ship, or in the actual performance of the seaman's duty.

A sailor must, in judgment of law, be deemed in the service of the ship while under the power and authority of its officers; and he is entitled to be cured at the expense of the ship of any injury received by him in executing an improper order, or inflicted upon him directly by the wrongful violence of an officer of the ship in the exercise of his authority as officer to punish him.

THIS was a libel *in personam*, by Washington Ringold, against Ebenezer B. Crocker and others, owners of a ship, to recover seamen's wages.

The libellant shipped for a voyage from New York to the East-Indies, and back to New York, on board the ship, at \$17 per month wages. The voyage covered a period of fourteen months. This action was brought to recover the wages earned on the voyage, including the expenses of his cure on shore.

It appeared that while the vessel was in port at Manilla, the libellant went on shore one afternoon, and stayed over night. As he came alongside the vessel the next morning, the mate asked him why he went ashore without leave. The libellant replied that he went because he wanted to. As the libellant came up the side of the vessel, the mate struck him three blows on the head with an iron belaying-pin, by which libellant was much hurt. He went on shore and complained to the master, who was then boarding on shore, and who thereupon placed him at a house on shore, and directed a physician to attend him. Twenty-one days passed before libellant was able to return to his duty on board ship.

The respondent claimed to deduct for the time thus lost, and this presented the principal question discussed.

There was no evidence that the libellant was required to stay on board ship to be cured, or that the ship was provided with means for his cure.

Alanson Nash, for the libellant.

Burr & Benedict, for the respondent.

The libellant, it appears, was not injured in the service of the ship, nor in the course of his duty. The injury received by him was a mere personal wrong, brought on by the insubordination and insolence of the libellant, and for the consequences of which the respondents were not responsible.

• BETTS, J. It is plain that the ship is liable for the charges incurred in the medical treatment of the libellant on shore, and expenses of attendance, if his case was one which the ship was bound to provide for.¹ *Jacobsen's Sea L.* 144; *Abbott on Shipp.* 259, note 1; *Curtis on Merch. Seam.* 106, note 2; *Ib.* 107, note 1.

The point taken for the respondents is, that the libellant was wounded in a personal brawl with a sub-officer of the ship, and that they are not answerable for the expenses of the cure of his hurt received in that manner.

The testimony proves the injury to have been received by the libellant on board the ship, from blows inflicted by the mate in punishing him for alleged misconduct and contumacy. The instrument employed was every way an improper and unsafe one to use in correcting a sailor, if he rightly deserved punishment. The mate, however, plainly considered himself in the exercise of his authority over the libellant as an officer of the vessel, for he first reprimanded him for absence from the vessel, and then struck him with a belaying-pin because of impertinent or disrespectful language in reply.

¹ See, also, on the liability of the ship for the expenses of a mariner's cure of hurts received in her service, *The Atlantic*, decided in February, 1849, and reported *post*, in order of date.

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There was at the time no quarrel between them, and no assault upon the mate was attempted on the part of the libellant.

The version given by the mate of the transaction is contradicted by the bystanders, and ought, under the circumstances, to have little weight without corroboration. The excess of punishment given by an officer in the exercise of his authority on board, or the use of an improper instrument to inflict it, cannot change the nature of the sailor's rights in respect to the ship or her owners. Had the seaman sickened from the infliction of a punishment given by an officer in the ordinary manner on ship-board, and which proved to be beyond his strength or state of health to bear, there can hardly be a question that he would be entitled to be cured of such sickness at the expense of the ship. A sailor must, in judgment of law, be deemed in the service of the ship, whilst under the power and authority of its officers; and an injury received by him in executing an improper order, or inflicted on him directly, by the wrongful violence of the officer, in the exercise of his rightful power and command over him as an officer, must equally entitle him to this privilege secured him by the law maritime.

The ancient sea ordinances provided, that mariners falling sick during the voyage, or hurt in the performance of their duty, should be cured at the expense of the ship. *Curtis on Merch. Seam.* 106, note 2.

The *service* of the ship is by no means limited to acts done for the benefit of the ship, or in the actual performance of seaman's duty on board. *Reed v. Canfield*, (1 *Sumn.* 195,) was the case of a sailor who drifted to sea, and was badly frozen, in a boat, in port, after the voyage had terminated. The whole boat's company had gone on shore wrongfully, and had also disobeyed orders in overstaying the time limited them, and that misconduct probably led to the injury; as a sudden change of weather, occurring subsequent to the ter-

mination of the leave of absence, prevented the boat reaching the ship, and caused the exposure which resulted in the libellant's being frozen and disabled. Still the Court held that he was entitled to charge the ship with his cure.

If the present case presents a point not clearly included within any adjudged case, the principle, in my judgment, is common with that upon which the ship is ordinarily held liable for the cure of seamen; and I am in no wise disposed to weigh a balancing question, should this be regarded one, unfavorably to the mariner. If there is hardship in the rule, it is better that it should bear more heavily on the ship and owners than on the seaman. The ship is to bear the expense of board, medical advice and attendance, and those other charges incident to the nature of the complaint and the climate, or circumstances of the confinement. The *Brig George*, 1 *Sumn.* 151; *Lamson v. Wescott*, *Ib. App.* And the responsibility of the owners personally is co-ordinate with that of the ship. 3 *Kent*, 5th ed. 133, note; *Abbott on Shipp.* 158, 172, 780.

I shall pronounce for full wages for the voyage, and an order of reference must be taken to a commissioner to state the amount. Such deductions are to be made as are properly allowable for payments, if any, by the master, in behalf of the libellant, incidental to his cure, and not directly required for it. The respondents are also to be credited with the amount of advance payments in money, and articles furnished the libellant at his request by the master during the voyage.

Decree accordingly.

Baxter v. Leland.

BAXTER v. LELAND.

As between the original parties to a shipment, it is competent for them to show the actual condition of the goods at the time of the shipment.

The phrases, "the dangers of the seas," "the dangers of navigation," and "the perils of the seas," employed in bills of lading, are convertible terms.

A dampness or sweating of the hold of a vessel, shown to be the ordinary accompaniment of a voyage from southern to northern ports, and to result not from tempestuous weather, but from occult atmospheric causes, is not a "peril of the seas."

Wherever a cause of injury to a cargo lies very near the line which separates excusable perils of the seas from those dangers for which carriers are responsible, regard is to be had to the custom of the trade in determining whether it is to be classed with perils of the seas or not.

Where there is a notorious custom in a particular branch of commerce, of stowing goods of a particular description on board ship in a certain way, shippers, who consider such mode of stowage hazardous, must notify carriers of their wish to have a different one adopted, or they will not be entitled to charge the latter with injuries received in consequence of its adoption.

The propriety of the common-law rule respecting the liability of common carriers considered.

THIS was a libel *in personam*, by Sylvester Baxter and others, owners of the ship *Cleone*, against Horace Leland and others, to recover freight and primage on a cargo of flour.

The libel showed that the libellants had transported a cargo of 1076 barrels of flour in the libellants' vessel, from New Orleans to New York, which were consigned to the respondents at the latter port, and were duly delivered to them there. The libellants demanded \$430.40 freight, and \$21.52 primage.

The answer set up that the flour was delivered in a damaged condition, and that the loss incurred by the respondents and chargeable to the libellants amounted to \$531.50.

It appeared upon the proofs in the cause on the part of the respondents, that on an inspection of the flour, when delivered at this port, 601 barrels were marked "B. bad," and 69 barrels were marked "xd. bad;" and it was further proved

that the deterioration in price upon those marked "B. bad" was from seventy-five cents to one dollar a barrel; that upon the others was about twenty-five cents a barrel.

For the libellants, evidence was offered tending to show that the flour was not put on board the vessel in good condition. Thus they showed that ten barrels were stained on the outside when shipped at New Orleans, though it appeared that the residue of the shipment was, so far as was indicated by external appearances, in good order. Evidence was also put in by the libellants, tending to show that by the method of transportation adopted for bringing the flour from the interior of the country to New Orleans, and also by exposure on the wharf at New Orleans, while waiting to be laden on board ship, the flour had been liable to get wet, and that it was taken on board under circumstances which might well cause its injury in the manner disclosed upon its arrival at New York.

To rebut the inference sought to be drawn from these facts, the libellants gave evidence that the flour, when manufactured and put up, was perfectly sound and sweet, and that such care and attention were bestowed in forwarding it as to leave no ground to presume that it was put on board the ship in a damaged condition. It was manufactured at Ewing Mills, in the county of Muskingum, Ohio, and early in December, 1847, was forwarded by canal and flat-bottomed boats from the mills to New Orleans, where it arrived about January 20, 1848.

The bill of lading, signed by the master of libellants' vessel, and dated February 1, 1848, contained an admission that the flour was received on board the ship in good order and well-conditioned; but a memorandum in the words "weight and contents are unknown," was added by the master before his signature.

Other facts, especially such as relate to the usage prevail-

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ing amongst persons engaged in the business of shipping and forwarding like goods from New Orleans to the North, are stated in the opinion.

E. C. Benedict, for the libellants.

A. P. Man, for the respondents.

BETTS, J. As between the original parties to the shipment, it is competent for them to show, by evidence outside the bill of lading, the actual condition of the flour at the time of shipment, (*Howard v. Tucker*, 1 *Barn. & Ald.* 712,) without the aid of this exception; and the reservation by the master, in executing the bill of lading, imposed on the shipper no obligation to give other evidence than the bill of lading itself, that the contents of the casks corresponded with the admissions in it, until affirmative evidence is furnished tending to show a mistake in the receipt in that respect.

The memorandum made by the master, that the contents and weight of the casks were unknown, does not change the character of the instrument. It operates as it would without that reservation, as *prima facie* evidence that the shipment corresponded with the representation, but subject to be rectified by proof that it was otherwise.

The libellants show that ten barrels were stained upon the outside when received on board, but they furnish no evidence raising a reasonable presumption that the contents of any part of the shipment were injured.

The gist of the controversy has been, on the part of the libellants, to show that the damage the flour had received arose from its inherent qualities,—from dangers of the sea,—or from the usual and ordinary damp and sweating of the ship on the voyage.

The struggle on the part of the respondents has been to make it appear that the cargo of the ship was improperly stowed, and that the injury received by the flour was occasioned by placing it in the hold of the ship on the top of hogs-

heads of new sugar, and laying over it sacks or bags of Indian corn.

The libellants deny their liability for the damage, should it be found to have been so occasioned, upon the assertion that the storage was in consonance with the common and well-known usage of ships engaged in freighting from New Orleans to the northern Atlantic ports.

I do not think a custom has been established in this respect, which, if the loss sustained by the respondents is owing to wrongful stowage of the ship's cargo, will, of itself, exonerate the libellants from their liability as carriers. As to the essential damage, the case hinges, then, in my view of it, on the point whether it is satisfactorily made out by the respondents that the injury to the flour was caused by stowing it in juxtaposition with the sugar and corn, and that such stowage was improper and unsafe.

There seems to be no essential disagreement in the evidence respecting the condition of the hold when opened to unlade the cargo. It was found heated to a high degree. The corn in some of the bags had sprouted, and the grain was so hot as to render moving it by hand painful. This part of the vessel was also filled with a strong vapor and dampness. The flour in many of the barrels was found caked or coagulated, so that it could not be separated by the hand, and in others it was soured; and there is no reason to question, upon all the proofs, that the condition and temperature of the hold would ordinarily and probably produce the consequences found to exist in respect to the flour, had it been sweet and in good condition when laden on board at New Orleans. The disagreement in the testimony is as to the probable cause of that state of the hold of the vessel.

The ship, when she took in cargo, was in sound condition, and on her arrival here was found not to have leaked at all.

It is proved, by numerous witnesses of great experience in the New Orleans trade, that vessels running north will almost

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invariably sweat, or disclose an interior moisture or dampness, sufficient often to be productive of serious injury to goods on board, and that this condition of the ship, except as to degree, is irrespective of the cargo she carries. The cause of this cannot be ascertained with certainty, but it appertains in no way to the insufficiency of the ship; it is generally ascribed to the sudden change of climate, and augmented, as has been usually noticed, by rough weather, and also by any natural moistness in the cargo, yet exhibiting itself to the highest degree in the cold seasons of the year.

The libellants contend that if the damage to the flour is imputable to the state of the vessel, whether produced by the sweating of the ship or the character of the cargo, they are exonerated from liability;—on the first supposition, because their undertaking does not guaranty against loss; and on the second, upon the custom or usage of the trade, which justifies this method of stowage; and also on both, by the exception in the bill of lading, of "*the dangers of the seas*," in one copy, or "*the dangers of navigation*," as expressed in the other. It is to be remarked that this change of phraseology is not to be understood to indicate any different intent with the parties; and either mode of expression, standing without qualification in an instrument of this character, should be accepted as equivalent to "*perils of the sea*," and all are treated in the cases as convertible terms. In *The Reeside*, (2 *Sumn.* 568,) and *Aymar v. Astor*, (6 *Cow.* 266,) the exception was of "*dangers of the seas*," and in *Fairchild v. Slocum*, (19 *Wend.* 329,) the "*dangers of Lake Ontario*;" and these exceptions were regarded by the courts as of the same significance as the common one of *perils of the seas*. It is, however, plain that the exception is not to be understood as embracing those losses flowing from culpable or negligent stowage of cargo, (2 *Sumn.* 568,) or other improper acts of the master or owner, which are proximate causes of the loss. *Story on Bailm.* § 512; *Abbott on Shipp.* 384, 385; 3 *Kent*, 300.

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So, also, upon the authorities referred to, the dampness or sweating of the ship cannot properly be ranked in the class of perils of the sea. Tempestuous and violent weather tends to increase this difficulty, but does not produce it; all the testimony showing that it occurs in smooth and quiet voyages, when there is no straining or unusual rolling or pitching of the ship. Its causes are probably atmospheric, but whether ascribable to that source or to others more occult, it is attended but imperfectly with those characteristics which might class it with perils of the sea. *Story on Bailm.* § 512; 3 *Kent*, 216, 217. It is of ordinary occurrence, scarcely failing to exist in any case of navigation from New Orleans to northern ports, in the cold seasons of the year. It does not result from, nor is it accompanied by, any *irresistible* force or *overwhelming* power, nor does it take the aspect of *inevitable* accident, in the sense of a sudden or violent occurrence, although it cannot be guarded, against by the ordinary exertion of human skill and prudence. *Story on Bailm.* § 512. It is a quiet, secret exhalation, generated from the hold of the vessel, and in no other known way produced by winds and waves and navigation than that these are the agents and accompaniments of her transit out of a warm into a cold climate.

But although within the fair import of the exception in the bill of lading, the master or owners may not be protected from answering for such injury, I think they are not, in their capacity of carriers by water, absolutely responsible for the injury, in so far as the damage is not incontestibly traceable to faulty stowage; because, if occurring otherwise, or if the testimony leaves it doubtful whether the damage was not occasioned as well by other causes as the manner of stowage, they are entitled to the benefit of the known custom or usage of trade in this respect as a protection against liability for the loss.

The testimony in the cause proves a uniform and well understood usage in the trade between New Orleans and New

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York, that injuries received by goods from the sweating of the vessel should be borne by the goods alone.

Chancellor Kent says, what is an excusable peril depends a great deal upon usage, and the course and practice of merchants; and it is a question of fact to be settled by the circumstances peculiar to the case. 3 *Kent*, 217; *Trott v. Wood*, 1 *Gall.* 443. And in the case of *Gordon v. Little*, (18 *Serg. & R.* 533,) a general usage was admitted in evidence to lessen the responsibility of carriers.

In a case, then, hovering very closely upon the verge of the well-settled doctrine which would exempt the master from liability because the loss was incurred by a peril of the seas, I think there is just propriety, if the particular instance merely fails to fall within that rule, in applying to it the principle that the usage of the trade shall determine the question of liability. There is no evidence that the loss was ever claimed, in such cases, of the owners of the ship. It was, for a period of time, attempted to charge these losses upon the underwriters of the ship, under a special clause then inserted in policies, and supposed to cover this peril. Since that clause has been excluded, it is in proof that the uniform usage has been to charge the loss upon the goods as a peril belonging to them, and not covered by the responsibility of the carrier. I shall adopt that as the principle governing the question as to part of the damages claimed in this case. That will discharge the libellants from the claim of damages for the injuries to sixty-nine of the barrels, there being no evidence of any injury to them beyond what would probably be sustained from the sweating or dampness usually occurring in ships on such voyages. If, as is contended, the flour was soured by the steam arising from the sugar, that fact could be shown by its smell or taste, as in such case the flavor of the sugar, it is proved, is imparted to the flour. There is no proof that this was so affected. So, also, in respect to this portion of the cargo, the small damage occurring might be with much

reason ascribed either to causes inherent in the article, or to those engendered in its consecutive changes of climate, in the transportation from the mills where it was manufactured to this market, although it was apparently merchantable and sound when delivered to the ship. The evidence shows that cargoes of flour thus circumstanced are so frequently found slightly deteriorated when delivered here, as to establish that to be a probable if not necessary concomitant of such course of transportation.

The remaining inquiry relates to the six hundred and one barrels, and involves two considerations :—

1. Whether the sugar and corn, or either, have been direct and active agents in producing the damage sustained by the flour.

2. Whether it was improper stowage to place the flour in proximity with those articles, in the manner in which this cargo was laden, so as to subject the master to answer for the consequences.

There is no evidence but that the sugar casks were sound and properly coopered, or that there was any actual leakage from them. I do not rehearse the proofs as to the effect of stowing flour in a close hold in connection with sugar and corn. Very many witnesses were examined, and the result of the testimony on this point must be taken as establishing that such stowage as was made in the lower hold of this ship would account for the damage received by the flour, and that these consequences would most probably follow from it. The stowage, itself, was every way proper in securing the hogsheads, barrels, and bags in their places; but the sugar and corn exposed the hold to an extraordinary heat and dampness by their exhalations, which would naturally be prejudicial to the flour exposed thereto.

Five hundred and fifty-three barrels were taken from the lower hold, all in a very bad state. These had been placed on hogsheads of sugar, and sixty or eighty bags of corn

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thrown in among the barrels, or on them, and then the hatch between decks was battened down. The rest of the flour was placed between decks, where cotton and corn were also stowed.

I do not find enough in the proof to satisfy my mind that any part of the flour between decks was injured by the evaporations or fumes from the sugar, and think whatever damage it sustained may be imputable to the ordinary sweating and dampness of a sound, tight ship on such voyage.

But it appears to me that the evidence very satisfactorily establishes that a moving cause, if not the proximate one, of the damage to the flour in the lower hold, was the placing it in tiers over hogsheads of sugar, and stowing amongst and over the barrels, bags of Indian corn. The proof is direct and full from persons conversant with like shipments, and employed in receiving such cargoes from New Orleans and storing them here, that the common consequence of placing sugar near flour, even in open situations, is to impart a smell and flavor to the flour, diminishing its value, and that the manner in which this cargo was stowed, in the lower hold of the ship, would naturally tend to communicate a like damage.

The testimony of several shipmasters of large experience, and also of marine surveyors and stevedores, has been given, all concurring that for many years past it has been the familiar usage with general ships, freighted at New Orleans, to lade cargoes in the manner done in this case; that the great bulk of shipments at New Orleans for this port, consists of cotton, sugar, and provisions, including flour; and that there is no objection raised by shippers, or hesitation on the part of stevedores and masters, in stowing flour in barrels properly dunnaged, over hogsheads of sugar, in any part of the ship, and that without regard to the time the sugar has been manufactured; and that this mode of lading cargoes in general ships at that port is notorious here and at New Orleans, to persons concerned in forwarding or receiving produce; and

these witnesses are of opinion that such stowage does not of itself necessarily cause injury to flour laden in that manner.

The agents and shippers at New Orleans, and the respondents, are connected in business; and the bookkeeper of the respondents testifies that he wrote for them to their agents in New Orleans not to ship flour with sugar and corn on board.

Independent of the implied recognition of the course of business, this is direct evidence that the claimants were aware of the usage, and if they intended to have their goods carried in any other than the customary manner, it was incumbent on them to give the master specific directions.

A case involving a similar principle was decided in this Court, in *Sabbich v. Prince*, (*MSS.* 1840.) The agents of the respondents shipped at Bordeaux, in France, a quantity of mulberry trees on board of the libellant's vessel. The agents knew the vessel was laden with wines, and that the trees would be stored in the hold with the wines. No notice was given the libellant that such stowage would be hazardous to the trees. On delivery at this port they were all found to be dead; and it was contended by the respondents, on the proofs, that the destruction of the trees was occasioned by the effluvia and fumes generated in the hold by leakage or exhalation of the wines.

The decision of the Court upon that branch of the case was, that the shipmaster was not liable for the destruction of the trees by that cause, for want of notice or caution to him, that the claimants would charge him with the risk, inasmuch as it appeared to be the usual and customary method of lading that description of cargo at the port of shipment.

The case of *Faber v. The Ship Newark*, decided in this Court in February, 1844, turned in some measure upon the same doctrine; although in that case the additional particular was determined by the Court, that the loss was occasioned by *perils of the sea*.

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The action there was to recover damages to a lot of tobacco shipped with oil, grease and lard, and stained by the grease or oil which had leaked from the casks. The Court intimated the opinion that the ship was discharged from liability by proving the casks to have been safely and properly stowed and secured by dunnage, and not so placed in relation to the tobacco as to expose the latter to be directly affected by the drainage or leakage of the casks, if such leakage had occurred as an ordinary incident of transportation.

So, also, I understand the rule to be laid down by Judge Story, in the case of *The Schooner Reeside*, 2 *Sumn.* 567. He rejects, to be sure, the proof of usage or custom in the trade, throwing, under like circumstances, the loss on the owners of the cargo, but only because it was offered in contradiction of and at variance with the express terms of the bill of lading.

The libellant, in that case, shipped on board the schooner several bales of carpeting, which were greatly injured on the voyage by oil which leaked from casks stowed contiguously to the carpeting. The libel alleged that the carpeting was improperly stowed near the oil casks. The Judge says, in his opinion, "It would have been very fit and proper to have stowed the carpeting in a more prudent manner, in some other part of the vessel." But he determines that "there was no bad stowage in the case."

The decision against the vessel turned upon the fact that the master had taken the casks on board in very bad order, and very improperly coopered. *Ib.* 572. The manifest implication is, that but for the positive fault of neglecting to cooper the casks sufficiently, the ship would not have been liable for a damage which was occasioned by the improvident proximity of the carpeting to the oil casks, and not to perils of the sea.

The question is one of great moment in relation to the mer-

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cantile navigation of this country, and viewed in connection with the common-law doctrine of the responsibility of common carriers, is not free from embarrassment and doubt.

The stringency of the common law, in respect to common carriers on land, is certainly relaxed in many particulars of importance, in its application to ships and ship-owners in the carriage of goods by water. *Story on Bailm.* §§ 509, 512, 513. If some of the English Judges have recently indicated a disposition to fall back upon the rigor of the old doctrine, and enforce it against carriers by water, (*Riley v. Horne*, 5 *Bingh.* 217,) and some American authorities have echoed the sentiment, (21 *Wend.* 190; 2 *Story*, 17; 3 *Ib.* 349,) and have pushed it to the extremity that the liability cannot be restricted or qualified by notice of usage, (19 *Wend.* 234, 251; 21 *Ib.* 153, 354; 26 *Ib.* 591,) yet I think it is manifest that the gradual though slow advance in the amelioration of the ancient dogma in respect to common carriers, tends to place their implied responsibility on a footing, in its essential features, in harmony with that of other parties performing undertakings of trust for a reward. 2 *M'Lean*, 157, 540; 2 *Pet.* 115; 13 *Ib.* 181; 2 *Brev. S. C.* 178; 16 *Vt.* 52. And, indeed, it is difficult to reconcile the anomalous severity of the liabilities imposed by law upon common carriers with the rational obligations of a hiring or trust, except upon the assumption that they undertake their employments with full assent to become insurers. If the rule and measure of their liability were now to be first introduced into our jurisprudence, it can scarcely be expected that it would be framed or sanctioned upon the implication that they were to be dealt with as common thieves and robbers; yet that seems the essential groundwork of the old rule.

No reason, very palpable to the understanding, exists for discriminating between the responsibility of a person undertaking to transport goods from place to place, and that of another who is the depositary of them. In the ordinary course

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of things there is an equal opportunity to the depositary as to the carrier to convert the goods, if such be his disposition, to his own use ; and the same risk of having them lost to the owner through accident or exposure, involuntarily on the part of the depositary, and without any means of proving fault or negligence against him. Yet warehousemen, wharfingers, &c., are relieved of the operation of the rule governing the carrier who brings goods to or takes them from his charge. 2 *Kent*, 591, 600, 601, and notes.

In the decision of this cause, however, I do not intend to trench upon the rules fixing the liability of carriers, further than those rules may be claimed to bind them as absolute insurers of the goods transported, irrespective of the custom or usage of the business or trade with which the transaction is connected, and regardless of deterioration or loss of the goods by inscrutable natural agencies, without fault of the carrier.

I hold, in this case, that the flour was stowed conformably to the usage of the trade in freighting in general ships, known to the respondents ; that the ship was sound and tight ; that the shipment was delivered in apparently like condition to that in which it was received on board, except slight stains upon the barrels from mould or damp, which are not proved to have affected their contents ; that the libellants are not responsible for injuries received by the flour in consequence of the mere sweating of the ship, or in consequence of exhalations or vapors arising from other parts of the cargo, which was well stowed and secured. I accordingly pronounce in favor of the libellants for the freight and primage demanded, and costs of suit to be taxed.

Decree accordingly.

THE CORNELIUS C. VANDERBILT.

Where a steamer and sailing vessel are approaching each other in dangerous proximity, it is not, in ordinary circumstances, the duty of the sailing vessel to give way to the steamer; but it is her right and her duty to maintain her course.

But if there are special circumstances from which it clearly appears that the sailing vessel can prevent a collision otherwise inevitable, by a departure from her course, she is bound to make it.

A sailing vessel on the wind, meeting or converging towards a common point with a steamer, has no right to persist in her course in such a manner as to make a collision probable, or so as to drive the steamboat into danger or exposure in order to avoid her, particularly after being hailed to change her course.

This principle is especially applicable to sailing vessels and steamers meeting in the harbor of New York.

THIS was a libel *in rem*, by Elias S. Bloomfield, owner of the sloop Grocers, against the steamboat Cornelius C. Vanderbilt, to recover damages for a collision between the two vessels.

The facts appear sufficiently in the opinion of the Court.

Mr. Bloomfield, for the libellant.

H. B. Cowles, for the claimants.

BETTS, J. On the afternoon of the 25th of July last, the steamboat Cornelius C. Vanderbilt, and the sloop Grocers, owned by the libellant, came into collision off the Battery, in the harbor of New York. The sloop sustained damages, as is alleged, to the amount of about \$400.

The collision occurred in the following manner:—The steamboat left Pier No. 1, on the North River side, at her stated time, 5 P. M., for Stonington. Her wheel, as usual, was put hard-a-starboard on starting, in order to bring her round on a curve to her true course, in the shortest space practicable. The wind was southwest, blowing free, and the tide flood. As the steamer was in the act of leaving the dock, and under way, the sloop Grocers was seen out in the

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river, about a quarter of a mile distant. The sloop was on the wind, upon her starboard tack, heading southeasterly, with the wind free about two or three points. The sloop was bound into the East River and up the Sound.

In the direction the two vessels were pursuing, their tracks would necessarily cross, and in such manner as to render a collision inevitable. They struck within a minute or two, the steamer being still on her turn, so that the bows of the two vessels came together obliquely side by side; as some of the witnesses expressed it, they "sagged up against each other."

The engine of the steamer had been stopped and reversed, and the wheels were working backward when the vessels struck.

When they were several rods apart, the sloop was hailed earnestly from the steamer to *luff*, or to put her helm down. The master of the sloop replied, "he would be d——d if he would do it."

The master of the steamboat Knickerbocker, whose boat was close alongside of the Vanderbilt, and crowded in shore by the latter boat in making her turn or sweep, testifies to the hail and reply, and says that there was sufficient room between the sloop and steamer for the sloop to have luffed and avoided the steamer, and that there was nothing in the way to prevent her so doing, or turning about if necessary. This statement, as to the ability of the sloop to make either movement, is fully supported by the testimony of two passengers on board of the Vanderbilt,—one of them an experienced boatman. The position of the sloop and other vessels in the vicinity prevented the steamer bearing up to the starboard.

Laying out of view the evidence of the master and two pilots of the steamer, and that of the master and two hands of the sloop, whose statements as to the relative positions and acts of the two vessels are in direct conflict, there is opposed to the testimony of the two passengers the evidence of Midshipman Mulligan, who observed the transaction from the frigate Cumberland, at anchor a few rods off from the point

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of collision. His examination was taken by deposition, out of court, and in applying his statements to the case, it must be remarked, that upon the whole evidence, it is clear he misapprehended the facts in several particulars, or has stated them imperfectly. He says that the steamer *Empire State*, at the same time, passed the sloop on her starboard side, and also simultaneously passed on that side of a French bark then there; that the collision took place astern of the *Cumberland*; that the sloop lowered her peak before the collision, and could not have luffed and gone clear of the steamer. These are circumstances of no great moment of themselves, but the proofs, which show beyond question that the witness was mistaken in every one of those particulars, indicate that the young gentleman was not so clear and accurate an observer of the occurrence as to justify giving his version higher credit than that of Captain Van Pelt, of the *Knickerbocker*, who differs from him in each particular, and was so placed with his boat in relation to the transaction as to have a better opportunity to observe the exigency of the situation of the two vessels, and their relative means to avoid it. Messrs. Pomeroy and Richmond, the passengers on board of the *Cornelius Vanderbilt*, were also placed nearer the scene of action, and were more concerned in noticing and marking what transpired than Mr. Mulligan; and all these testify to his misconception of those facts.

Upon the evidence of these three witnesses, then, it is satisfactorily proved to have been within the power of the schooner to have avoided the collision, without hazard to herself, or other inconvenience than that of luffing into the wind, and the few moments delay which might arise from that manœuvre.

But it is contended by the libellant that he was not bound to take that step, or do any thing other than hold the course upon the wind which the sloop was under at the time.

The Court has too often stated and enforced the rule, to be now called upon to reason out its obligation and utility, that

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in ordinary circumstances the sailing vessel so placed is not required to give way to a steamer; and also, that it is her duty and right to maintain her course, unless something special in the existing facts makes it plain that the steamer cannot avoid a collision, and that the vessel under canvas can prevent it, without endangering her own safety by changing her course. *The Narragansett and The Neptune, (MSS.) 1846.*¹

Then a law higher than any general maritime usage comes in force, and requires every man so to conduct his vessel as to save her and others from the peril of a collision, if he can probably effect it. And more especially will all privilege to a particular tack or course or method of passing, not essential to her own safety, be withdrawn from a vessel, when she has notice that adhering to it will place another in jeopardy. She must then contribute to the common safety in such manner as a sound judgment on the facts and circumstances shall decide to have been necessary and proper. Accordingly, a sailing vessel on the wind, meeting or converging towards a common point with a steamer, has no right to persist in that course as a privileged one, in such manner as to make a collision probable, or to drive the steamboat into certain danger to herself or other vessels in order to avoid her. *The Hope, 1 W. Rob. 157.*

In the harbor of New York, crowded as it is with craft of all descriptions, so that but a limited space is allowed for the management of large vessels, and where baffling eddies and tides are to be encountered, it is more necessary than on broader pathways, for vessels of every class to forego special privileges, and render in their own movements relief to the

¹ Since reported, *Olcott*, 249; *Ib.* 494. See, also, on the relative rights and duties of steamers and sailing vessels in respect to collisions, *The New Champion, ante*, 202; *The Bay State, ante*, 235; *The Washington Irving, ante*, 336.

navigation of others with which there is danger of being brought in conflict, particularly if apprised what is necessary to be done to that end.

The case in question affords an illustration of the necessity and application of this principle.

Three steamers of the largest class left adjacent piers at the head of the Battery, at precisely five o'clock each afternoon, to make their passages up the Sound. The time and manner of their departure was notorious to everybody sailing in the harbor. It is also well known that they come out of these berths, heading directly west, and must describe a complete circle amongst the shipping in the harbor in making a distance only the length of the Battery, in order to get their course east into the mouth of the river. Whilst moving over that curve, their means of ready self-control are considerably diminished; that is, they cannot sheer quickly to starboard, and generally can only sheer to larboard or stop and back. They are, undoubtedly, bound to use every reasonable foresight and precaution while coming into and working out of this practically crippled state. They must exercise a watchful attention, place competent and sufficient help at every post on board, and proceed so slowly as to secure the most immediate command of their movements which is practicable. Being prepared with and ready to use these precautions, these steamers cannot be compelled to lie in their dock till the harbor is clear of every object that might fall in their way. They are entitled to claim the coöperation of other vessels, when hazard of collision occurs, to take measures on their part to prevent it; and the vessel which shall refuse to yield such aid when conscious of its necessity, and hold doggedly to a supposed right to throw the whole risk upon the steamer must, in case of accident and injury so caused to her, expect but slender sympathy in her appeal to the equity of courts of justice for recompense.

I hold in this case, that it was a fault in the sloop not to

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have luffed up into the wind, when so urgently called to do it from the steamer, and where the necessity for her to do so was so strongly probable. The decided weight of evidence is that she could have complied without detriment or exposure to herself, and thus have opened a safe passage for the steamer.

The master of the sloop testifies, that when hailed to put his helm down, he answered, "G—d d—n you, stop the steamboat;" and it is evident that he was influenced by the persuasion that the steamer had taken all the responsibility of the hazard in which the two vessels were placed, and had no right to claim his aid.

I do not deem of great account the minute estimates of yards or rods, or moments of time, given by the various witnesses in respect to the transaction, nor whether the collision occurred more or less fathoms from the frigate Cumberland.

The essential facts are substantially agreed to by the witnesses, and the *opinions* of those on board of the sloop, and of Midshipman Mulligan, that her conduct was unexceptionable, and that of the steamer faulty, are overbalanced, in my judgment, by the clear proofs in the case.

I shall accordingly order that the libel be dismissed, but without costs. I do not accede to the impressions of one of the witnesses that the master of the sloop intended to run her against the light works of the steamer. I am satisfied he acted upon the belief that he was entitled to hold his course, and that the steamer, if she approached him or crossed his path, must do so wholly at her own peril.

In that he committed an error, which undoubtedly rendered the collision unavoidable by the steamer, and he cannot therefore recover damages for the injury thus brought upon herself, although he may have acted with no purpose or wish to prejudice the steamer.

On the other hand, the steamer could have stopped her way on coming out of the slip and discerning the sloop, be-

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fore becoming surrounded by other vessels, and thus losing the power to extricate herself, and she thus might have gone ahead without interference with the sloop. She was excusable in proceeding and relying upon the concurrence of the sloop, if it should become necessary, to help in opening a way for both; but the disregard of that confidence, and the indisposition of the master of the sloop to do what was reasonable and proper on his part, does not impose an obligation upon him to fulfil it so as to lay a foundation for a demand by the claimant for costs against him therefor. There was some risk in running the steamer into the bay when a sailing vessel was approaching her necessary course, in such manner that it might not be in her power, by her own exertions, to avoid becoming embarrassed by her, and that degree of imprudence, although not culpable, takes away the equity of a claim to costs.

Decree accordingly.

LAMB v. BRIARD.

The certificate of a consul of the United States in a foreign port, (under the act of July, 1840,) that the discharge of a seaman was granted upon the seaman's consent, is conclusive upon that fact, unless it is shown that the conduct of the consul was corrupt or fraudulent.

THIS was a libel *in personam*, filed by James Lamb against William A. Briard, master of the ship *Far West*, to recover wages.

The libel stated that the respondent shipped the libellant, as steward, on board the *Far West*, in February, 1848, at New Orleans, for a voyage to Europe and thence back to some port in the United States, at \$20 per month; that shipping articles were signed; that libellant entered upon the service of the ship, February 10, 1848, about which time she

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sailed for Europe; that on the arrival of the vessel at Havre, the mate sent the libellant on shore to prison, and on his release from prison the master, having hired a new steward, refused to permit him to return to his duty on board ship; that libellant applied to the American consul for redress, and being informed by the consul that the master was very vindictive against him, he quitted the ship, which soon after sailed, leaving him at Havre, where he was detained, at his own expense, three weeks. The libel claimed to recover wages for the entire voyage, and the expenses incurred by him at Havre, amounting in all to \$51.35.

The answer stated that on the outward voyage, and while the ship was in port at Havre, the libellant was disobedient, interfering at the last in a turbulent manner to prevent the discipline of the ship from being carried on; that he was, on account of this conduct, put in prison; that the respondent immediately thereupon laid the case before the American consul, who took the case wholly into his hands, caused the libellant and other disobedient members of the crew to be brought before him, and reprimanded them and ordered them to return to their duty; that they all did return, except the libellant, who requested his discharge; that the respondent consented to his being discharged, and that the consul certified the libellant's discharge on the shipping articles, paid him his wages, computed at \$20.86, and took his receipt for that sum in full.

The shipping articles, the receipt given by the libellant, and the certificate of discharge, were produced and duly proved upon the hearing.

Alanson Nash, for the libellant.

F. S. Stalknecht, for the respondent.

I. The consul had full power to discharge libellant in Havre. The act of 1840, (ch. 48, §§ 5 and 6,) gives discretionary power to consuls to discharge a mariner at a foreign port, upon the application of master and mariner.

II. All the requirements of the act were complied with by

the consul. The consul, Jones, and the second mate testify that libellant requested to be discharged. It is also admitted that respondent subsequently united in the request, assigning as reasons therefor that Lamb was incompetent, insolent, and disobedient. The proper entry was also made upon the list of the crew and the shipping articles.

III. The discharge was, therefore, *prima facie* right and proper. But it will be sought to set it aside on the ground that Lamb was *coerced* to ask for his discharge by being imprisoned, and by a threat to bring him home in irons. Doubtless he was induced by these considerations to wish to leave the ship; but if the imprisonment was proper, and caused by his disobedient and mutinous conduct, and his discharge was necessary to preserve the discipline and safety of the ship, this Court will uphold it. "Discharges given with due deliberation and full explanation of circumstances, should not be set aside on light grounds." *Thorne v. White*, 1 *Pet. Adm. R.* 178. Final discharges and compromises, on due consideration, should be upheld. Per Peters, J., in *Harden v. Gordon*, 2 *Mason*, 561. The cases all concede that the right to imprison exists though there must be sufficient cause. *Abbott on Shipp.* 179. In *The United States v. Ruggles*, (5 *Mason*, 192,) it was decided that in case of mutiny the right to imprison exists.

IV. A review of the facts in this case shows that the imprisonment of the libellant was not only justifiable, but necessary.

V. As to the libellant's claim for his expenses in Havre, there is no proof of the time he was there, or of the amount of his expenses. The presumption is that he shipped on board of another vessel, as he assured the consul he could easily obtain another ship.

VI. A distinction is also made in the books between the power to discharge a seaman and a steward. In the case of *Black v. The Ship Louisiana*, (1 *Pet. Adm. R.* 268,)

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it was decided that if a steward is found to be incompetent, the master can discharge him. It is in evidence that Lamb was not only insolent and disobedient, but also *incompetent to discharge his duties as steward*.

VII. Further, the general principle of maritime law is, that a seaman may forfeit his wages by gross offences. Lamb certainly was guilty of gross offences, such as constitute a forfeiture.

BETTS, J. The suit is obviously an experimental one, seeking to establish a right to wages upon the testimony of two shipmates, against the official acts of the United States consul at Havre, certifying the discharge of the libellant to have been by mutual consent on his part, and on that of the master of the ship, and with the approval of the consul.

Previous to the act of 1840, a seaman who deliberately and voluntarily took his discharge from a vessel in the course of the voyage, lost all claim to a continuance of wages, and the courts were disposed to countenance such discharges when it appeared that there were reasonable grounds for them. *Harden v. Gordon*, 2 *Mason*, 561; *Thorne v. White*, 1 *Pet. Adm. R.* 178. The act of February 28, 1803, however, in cases of discharge of seamen abroad, by mutual consent, compelled the master to pay the consul at the port three months' wages, as an indemnity to the United States against the support of the seaman and his passage home. The act of July 20, 1840, (§ 1, arts. 5 and 6,) conferred upon the United States consuls power to discharge absolutely mariners from vessels, on the joint application of both the master and the men, without requiring payment of three months' wages, when, in the judgment of the consuls, it was expedient; or the consuls were authorized to impose such terms for the indemnity of the United States, as they might deem proper.

The evidence is full to show that in this case the consul personally examined into the matter. He had the master

with the libellant and others of the crew before him, and decided that the libellant might be discharged. This was accordingly done—both his own consent and that of the master being also given. A certificate of the fact that the libellant was discharged by his own consent is entered upon the articles under the hand and seal of the consul, who, moreover, gives his testimony on deposition to the same effect. It is further proved, by the assistant of the consul, that the respondent paid into the consulate \$20.86, the balance of wages due the libellant, and that the libellant received the money and signed a receipt therefor, therein stating, also, that he had been discharged at his own request, and with his free will, and that the sum paid was in full of the wages due him, and of all demands against the ship.

This receipt is annexed to the commission, and is authenticated by the consular seal, and proved by the deposition of the assistant.

This is evidence of the most satisfactory character, that the rights of the seaman were duly cared for and protected, and it relieves the Court from all those doubts which not unfrequently hang over the propriety of discharges abroad, granted at the instance of mariners alone.

Manifestly, Congress had in view the importance of placing over the conduct of masters and sailors the supervision of a public functionary, who should control these matters in subordination to the interest of the mariner and of the United States. This was also regarded as a sufficient check to improvident discharges, without the penalty of three months' wages being imposed. The actions of consuls under the provisions of the statute are, therefore, if not absolutely conclusive as to the facts that the discharge was by the consent and free will of the mariner and to his benefit, at least of force to overbalance the mere assertions and opinions of shipmates and other bystanders, however numerous they may be. In-

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deed, it is doubtful whether evidence could be received on the part of the libellant, impeaching the validity of the certificate and official act of the consul, unless it amounted to proof of fraud or plain dereliction of duty on his part.¹

It is unnecessary to consider the question which was raised by the counsel, upon evidence tending to show that the seaman was induced to consent to his discharge by the threat of the master and consul that he should be brought home in irons—viz., whether the application of a sailor for a discharge under the apprehension that he was to be subjected to imprisonment and hard usage on shipboard, when innocent of any offence, might be regarded as negating his free consent to the discharge. For in my opinion, there is *prima facie* evidence in this case sufficient to justify the master in confining the libellant and bringing him home as a mutinous and insubordinate seaman. And, furthermore, in my judgment, the decision of the consul, rendered upon an inquiry made on the spot into the allegations on both sides, and in presence of the parties, must, in a fair interpretation of the act of Congress, be regarded as final in this particular, unless the conduct of the consul be shown to have been corrupt or fraudulent.

The mischiefs of the old system were, that men were often compelled by the severe conduct of the master, or seduced by his connivance, to abandon the vessel abroad, to the great injury and oppression of the seamen themselves, and under circumstances tending to deprive the United States of their after services; and also that seamen were often kept on board in violation of their shipping contracts. The act of 1840 interposed the official supervision of consuls in the matter, referring it to them to determine when a seaman might be released from the vessel, on the mutual consent of himself

¹ In respect to the requisites of a valid consular discharge and certificate, see *The Atlantic*, decided February, 1849, and reported *post*, in order of date.

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and the master, and in what cases he might be entitled to a discharge because of the violation of the shipping contract on the part of the master.

The statute has provided no means of reviewing the determination of consuls in these matters, either on behalf of seamen or of masters, and accordingly they must be considered final, unless given under circumstances rendering them void *in toto*.

I hold, in the present case, that there is no foundation for the action, and that the libel must be dismissed with costs.

Decree accordingly.

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Where a warrant of arrest, although containing a foreign attachment clause, gives no direction to bring the garnishee before the Court, nor any citation to him to answer the libel, a default entered against him for non-appearance on the return of the process is irregular.

The primary purpose of the attachment is to effect the appearance of the defendant in the action, and not that of the garnishee.

The practice of Courts of Admiralty in respect to the process of foreign attachments—defined.

In order to authorize proceedings in a suit prosecuted in a Court of Admiralty by foreign attachment, to be carried on against the garnishee personally, it is necessary that the warrant or process served upon him should contain a summons or notice, warning him of the claim in suit, and citing him to appear and answer.

THIS was a motion, made on behalf of a party against whom, as garnishee, proceedings in a suit were being prosecuted, to set aside the proceedings in relation to him, for irregularity.

The facts on which the motion was based appear fully in the opinion.

Burr & Benedict, for the motion.

Alanson Nash, opposed.

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BETTS, J. The following facts are presented upon affidavits and the files of Court, as the foundation of the motion and of the opposition to it :—

A libel was filed in this Court on the 2d day of September last, by the present libellant against one Montgomery, master of the brig Margaret, for the recovery of wages. The libel charged that George Miln, in whose behalf the present motion is made, had in his hands freight moneys out of which the libellant was entitled to receive his wages for the voyage named in the libel, and that he also held other moneys belonging to the master and owner of the brig, by whom the wages demanded in the suit were owed to the libellant. It prayed process of arrest against the master of the vessel, and that he might be cited to appear and answer; and that, if he could not be found, that the property before mentioned might be attached to satisfy the libel, and that George Miln himself might be compelled to answer the interrogatories annexed thereto.

A warrant was issued against Montgomery on the second of September, and the return upon it by the marshal being "not found," an *alias* was sued out upon the fifth, for the arrest of Montgomery, accompanied with a mandate that, if he could not be found, the marshal should attach his credits and effects in the hands of George Miln, as garnishee.

The return of the marshal to this writ, filed September 11th, was again that respondent was "not found," and that a copy of the process had been served on George Miln as garnishee, personally.

No one appearing upon the return of the process, the proctor for the libellant caused a default to be entered against the garnishee, with an order of reference to a commissioner, to ascertain and report the amount of wages due to the libellant.

The report of the commissioner was filed on the 19th of September, finding the sum of \$38.16 wages to be due to the

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libellant; and on the same day an order was entered confirming that report, with the addition that, "on motion of the libellant, it is ordered that the libellant recover in this action, against the credits and effects of the respondent in the hands of George Miln, the garnishee, the amount reported due, together with his costs to be taxed; and that the libellant have his execution against the said credits and effects in the hands of the said George Miln, to satisfy this decree."

The decree having been perfected, the libellant took out process of execution, returnable on the third Tuesday of October. It recited the libel, and that such proceedings were had thereupon, that by the judgment and decree of the Court in the cause, entered on the 19th of September, the said George Miln was required to pay to the libellant the sum of \$38.16, besides costs to be taxed, and that the costs had been taxed at \$34.49, as by the files of the Court fully appeared; and it commanded that out of the goods and chattels of the said George Miln, in his district, the marshal cause to be made \$72.59; and it further commanded, that if for want of goods and chattels, lands and tenements of said garnishee, he (the marshal) could not make that sum, he should then arrest the body of the said garnishee, and hold him safely to answer said decree.

The marshal having proceeded to levy the execution on the property of the garnishee, an order was granted, at his instance, by the Court, staying all proceedings in the cause; and on that order, and on the preceding facts, a motion is now made by the advocate of the garnishee that all the proceedings in relation to him be set aside for irregularity, and with costs.

All the steps in the cause were taken *sub silentio* on the part of the libellant, without the consideration or sanction of the Court; and the orders entered and the processes sued out were accordingly at his peril; no other acts being done in Court, than to call the party and take the common orders of

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course upon his non-appearance, and to move a confirmation of the commissioner's report. The consequences to the libellant must be the same if the steps taken in Court were irregular and unauthorized, although his proctor, on an *ex parte* motion, obtained the assent of the Court to a formal default, because the terms of the order thereon are not prescribed or exhibited to the Court. They are almost invariably drawn up and entered on the minutes, as of course, by the clerk. If they are found improvident or contrary to the course of practice, the aggrieved party may come in and have them summarily vacated for irregularity. This principle pervades the practice of courts of every denomination.

The exhibit of the papers and minutes of Court demonstrates the entire irregularity of the libellant in obtaining execution against the property and person of the garnishee. There is no legal foundation laid for process of that character in any antecedent proceeding in the cause. No judgment was obtained or asked against the respondent, and accordingly there was no decree determining the right of the libellant to the wages or money demanded by the libel.

The libel only prays the attachment of Montgomery's effects in the garnishee's hands. It does not make the garnishee a party to the suit, or demand his arrest or citation; the prayer merely asking that he may answer interrogatories annexed to the libel, in no way connects him with the subject-matter of the action.

The warrant of arrest, with a foreign attachment clause, gave no direction to bring the garnishee into Court by monition or *capias*; and accordingly furnished no authority for entering an order against him for contumacy or default, in not appearing upon its return. He was not brought within the jurisdiction of the Court over the cause in such manner as entitled the libellant to a decree touching his property or person. If he held funds belonging to the respondent, they could not be rightfully exacted from him, except upon the

footing and by virtue of an existing debt against the respondent, duly ascertained and established.

The order or decree entered on confirming the commissioner's report was evidently awarded on the assumption that the respondent was duly in Court, and adjudged indebted to the libellant, and it brought back the proceedings to their legitimate restriction, in directing that execution should go against his credits and effects in the hands of the garnishee.

The writ of execution taken thereupon was an entire departure from the decree, in subjecting the individual property and the person, also, of the garnishee, to the satisfaction of the debt.

The irregularity of this step is most gross and palpable. The antecedent proceedings on the part of the libellant in Court furnish him with no color of authority for issuing final process of this stringency, or indeed for any final process against the garnishee. He might, with equal right, have put the *fi. fa.* and *ca. sa.* into the hands of the marshal in the first instance, and without filing a libel or obtaining an interlocutory order or decree in the cause; because all those proceedings had relation to Montgomery, the respondent, alone, and none of them in terms or spirit embraced the garnishee.

These considerations render it imperative upon the Court to set aside the execution *in toto*, with costs to the garnishee.

Upon the argument, however, it was sought by the libellant to maintain the correctness and necessity of the practice adopted, as the only method by which it was practicable to give parties the benefit of a foreign attachment. It was urged that the notification of the existence of such warrant to the holder of the debtor's property was sufficient to compel him to come into Court and surrender the property, or be held to admit, impliedly, that it was in his hands, and that it was adequate to satisfy the libellant's demand; and thus to novate him as debtor for the amount.

Although the remedy of foreign attachment is frequently

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resorted to in Admiralty Courts, there does not seem to be a very definite or uniform understanding with the profession in respect to the relation between the garnishee and the prosecuting party, or the method by which the assets of the debtor in the hands of the garnishee are to be brought under the authority of the Court. It may, therefore, be useful to inquire into the correct and feasible course in respect to these proceedings.

The jurisprudence of civilized communities seems studious to furnish means for rendering the effects of debtors liable to the claims of their creditors; and probably no other tribunals than courts of common law have found themselves incapacitated to effectuate that end by their inherent powers, without having first brought the debtor personally under their authority. What, then, in the English common law is an exceptional rule, limited in its operation to two small districts, is, in other systems, a common and pervading principle.

The proceeding by way of foreign attachment is one of the most familiar and effective instrumentalities supplied the judicial authority to that end. In England it is recognized in the local customs of London and Exeter only, but is established on a broader foundation in the polity and practice of the judicatories of the Continent, Scotland, and the United States. In these countries its force and utility is grounded in the high principle that personal obligations may be enforced by justice by preliminary and direct action on property, both for the purpose of compelling an appearance of the debtor, and his submission to the mandate of the courts, and also by the sequestration or transfer of such property to the benefit of those to whom it rightfully belongs, without other action against or coercion over the person of the debtor.

The scope and efficiency of this important remedy, and the method of its application, is instructively pointed out in the decision of the Supreme Court of the United States, in *Manro v. Almeida*, 10 *Wheat.* 473. It is a well-established branch

of Admiralty processes, not derived from the customs of London, but embodied in the Admiralty jurisdiction, in common with other essential elements of its powers. That case also supplies rules sufficiently explicit and full to direct the use and application of this particular power.

The proper object for the libellant to seek in this case, by means of a foreign attachment, was to compel the appearance of Montgomery, the respondent, to the suit instituted against him. He could not be reached by *capias* or summons, and at common law the libellant would be remediless against him except by the complicated and dilatory proceeding to outlawry. 3 *Blackst. Comm.* 284.

The writ of foreign attachment would have accomplished this purpose, expeditiously and with facility, if properly framed and conducted. In actions *in personam* in this Court, a *foreign attachment* is never employed as an original or independent process. It is auxiliary to a *capias* or monition to the debtor, and subserves only the end which an arrest or appearance of the defendant by stipulation answered. *Betts's Adm. Pr.* 30. It may be directed against goods and chattels, or rights and credits of the debtor, and be carried into operation by actual arrest of goods, when they can be found, or by notice of the object of the proceeding to those who have either or both in their possession. *Conkling's Adm. Pr.* 478.

When the service of the attachment is by notice, and not by actual levy upon the goods, it must necessarily be shown to the Court, before any order can be taken against the garnishee, that he has been warned of the remedy which the process demands, and for what cause, and of the time and place he must appear before the Court. His duty on appearance is to discharge himself of the effect of the citation, by showing that he holds nothing belonging to the debtor, or by specifying exactly what it is, and submitting himself, in respect thereto, to the authority of the Court; or he may contest the justness or amount of the libellant's demand.

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A *garnishee* is a trustee, or one warned by legal process in respect to the interest of third parties in property held by him, (*Webster's Dict.*; *Bouvier's Law Dict.*; *Encyc. Am.* tit. Attachment, Foreign,) and *garnishment* is the process of warning or citation. *Jacob's Law Dict.* Under the custom of London, the garnishee must be warned to refrain from paying money to the debtor held for him, and to appear and answer to the plaintiff's suit therefor. *Bohun's Cust. and Priv. of Lond.* 256; *Com. Dig.* tit. Attachment. So it seems he may plead to the general action, and deny the indebtedness of the defendant. *Com. Dig.* tit. Attachment, E. The same rule obtains in respect to trustee process. 6 *Dane's Abr.* c. 192, art. 1. And in the American courts the proceeding seems to be termed indifferently, *garnishment*, *trustee process*, or *foreign attachment*. *Serg. on Att.*; *Hildreth's Elem. of L.* 269-273; *Bouvier's Law Dict.*; *Encyc. Am.* tit. Attachment, Foreign.

Under the English law, the garnishee may appear by attorney, and plead that he has no property of the defendant in his hands; or he may confess it, or he may wage his law, or plead other special matter. *Bohun's Cust. and Priv. of Lond.* 256. The general issue is whether the garnishee had, at the time of the attachment, or at any time after, any money or goods of the defendant in his hands. *Ib.* 255. The plaintiff is thus put to prove that the garnishee had moneys in his hands; and if this proof is not made, a verdict will be rendered for the garnishee. *Ib.* 258.

When the proceeding is for the purpose of bringing the defendant into Court, and he makes default on proclamation, a *scire facias* issues against the garnishee. *Com. Dig.* tit. Foreign Attachment, A. On the appearance of the defendant, all proceedings against the garnishee cease. *Cro. El.* 157, 593; *Savage's case*, 1 *Salk.* 291. And he must have notice of the foreign attachment to bind him in the allotment of his effects to the debt by the garnishee. *Fiske v. Lane*, 3 *Wils.* 296.

In those courts of the different States of the Union in which the remedy of foreign attachment is employed, its effect is principally regulated by statute; but in all cases the cardinal principle in the proceeding is that the trustee or garnishee shall, by summons or *scire facias*, be brought into Court with notice of the claim upon him, and that he should have a full opportunity to oppose the demand. 6 *Dane's Abr.* 492, c. 192, art. 1-8; and see the practice in various States, as explained in *Graighe v. Nottmagel*, *Pet. C. C. R.* 345; *Manker v. Chandler*, 2 *Brock*, 125; *Fisher v. Consequa*, 2 *Wash. C. C. R.* 382; *Franklin v. Ward*, 3 *Mason*, 136; *Ib.* 247; *Pickquet v. Swan*, 4 *Mason*, 443; *Barry v. Foyles*, 1 *Pet.* 315; *Brashear v. West*, 7 *Pet.* 621; 2 *U. S. Dig. Supp.* 884.

Although the process of foreign attachment, as employed in Courts of Admiralty, is not borrowed from that given by the custom of London, yet both remedies being directed to a common object, and founded upon unity of principle, light is reflected by the one upon the other; and we may accordingly recur with advantage to the practice of the law courts for explications of the methods by which the common design may be best effectuated.

In this case, however, the more specific inquiry is, how the law and practice on this head stand in the Courts of Admiralty. The books are not full or explicit on the subject. They furnish little more than a clear recognition of the remedy, and give but scanty details of the method used in administering it.

Clarke's *Praxis*, the earliest historical record of the practice in Admiralty, was compiled, as appears by the preface to the edition in Latin, during the reign of Elizabeth, and became a standard authority long before it was published; and the scattered manuscripts were ultimately revised and arranged for publication under the sanction of men of great eminence and experience in that branch of the law. It has always been accepted as the most authoritative exposition extant of

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the early course and usages adopted in Admiralty proceedings. *Browne's Civ. & Adm. L.* 396 ; Sir Henry Blount's case, 1 *Atk.* 295 ; *Marv. Leg. Bib.* tit. Clerke, F. He speaks of attachments of property by warrant in Admiralty, as an ordinary usage of the Court, in case a debtor is concealed or absconded, and in case his goods are held by others, in order to compel his appearance in Court, and also to appropriate his effects to the satisfaction of his debts. The primary purpose of the warrant was to enforce the personal appearance of the party, that his condemnation might afford ground for sequestering his property ; and to that end, both the debtor and the person holding his goods are to be cited to appear in Court, and answer to the matter of claim in the libel. *Clarke's Pr.* tit. 28, 32. Hall's additions to those articles show the root in the then civil law from which the proceedings by foreign attachment sprung. *Hall's Adm. Pr.* 60, 70. It is plainly the origin, also, of creditor's bills in Chancery.

The United States District Court in South Carolina, (*Bee's Adm. R.* 186,) under that authority, issued a warrant to arrest property of a debtor to compel his appearance to a libel ; and although the form of the warrant is not given, the case implies that the process conformed to the directions given by Clarke.

The rules of practice of this Court, first compiled in 1828, and revised in 1838, provide, that if a party against whom a warrant of arrest issues cannot be found, and return to that effect be made upon the writ, the plaintiff may, upon the mandate of the Judge, have a warrant to attach the property of the defendant, and may also have a clause of foreign attachment inserted therein, according to the course of the Admiralty. *Dist. Ct. Rule*, 25. The same practice prevails in the First Circuit. *Dunl. Adm. Pr.* 139.

The foreign attachment sued out here must be "according to the course of the Admiralty ;" and that has been shown to require that a notice or citation to the garnishee shall com-

pose a part of the process. The argument against this motion is, that by Rule 29 of the District Court, the garnishee was obliged, on the mere attachment of the goods of a debtor in his hands, to file his affidavit, giving a full statement of the property in his hands, or to pay it into Court; and it is accordingly contended that such attachment was all the notice or warning necessary to be given him.

The rule referred to will not justify that interpretation. It does not prescribe the contents or regulate the manner of serving a foreign attachment. These proceedings are supposed by the rule to have been already taken conformably to the course of the Admiralty; and the rule then supplies a summary and cheap method by which the holder of the property impounded may become discharged from the case, and whereby, also, the creditor may be secured the control of the property attached.

Rules 2 and 37 of the Supreme Court, (adopted since the decision of *Manro v. Almeida*, 10 *Wheat.* 473,) specify concisely the course which the creditor and the garnishee are respectively to pursue under a foreign attachment. The process is described by which a defendant may be arrested in suits *in personam*. The mesne process may be merely a warrant of arrest of the person, or a simple monition, in the nature of a summons, to appear and answer to the suit, as may be prayed for in the libel, or the warrant for the arrest of the person may have a clause therein directing the officer, if the defendant cannot be found, to attach his goods and chattels, or if such property cannot be found, then to attach his credits and effects in the hands of the garnishees named therein.

It is insisted that the foreign attachment clause authorized by this rule is not required to contain also a summons or notice to the garnishee to appear, and that accordingly, no such citation need be made. The argument would, however, equally prove that it is not necessary to cite or summons the

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defendant himself; for as he is absent and cannot be arrested, if no citation is to be served upon the holder of his property, the libellant might seize the property and take a final decree and dispose of it, without notification of his proceedings to any person. This, manifestly, would be a violation of the first principles of personal rights and rights of property. Rule 37 of the Supreme Court, instead of favoring that interpretation, on the contrary expressly provides that the attachment clause shall summon the garnishee to appear and answer before the Court, as in ordinary cases *in invitum*. He is also required to answer upon oath as to the debts or effects of the debtor in his hands, and to such interrogatories as may be propounded by the libellant; and if he refuse or neglect to do so, the Court may award compulsory process *in personam* against him. *Sup. Ct. Rule, 37.*

A party will not, upon general principles, be subjected to an attachment except for disobeying or contemning some process or mandate of Court; and the principle imports that he has been brought within the jurisdiction of the Court by service of proper process upon him.

In any view to be taken of the subject, I am of opinion that the proceedings on the part of the libellant in this cause against the garnishee, are void for irregularity, and they must accordingly be set aside with costs.

Order accordingly.

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A ferry-boat plying across a navigable river is bound to remain in her slip, notwithstanding her appointed time of departure has arrived, if any vessel is seen or is in a position to be seen from on board her, with which she will be in danger of coming in collision if she goes out.

But she is not compelled to lie waiting the expected arrival of another vessel. In order to prevail in an action for damages occasioned by a collision, more must

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be done by the libellant than to show his vessel clear of blame; he must make it manifest that the loss was occasioned by the fault of those in charge of the colliding vessel.

Where a vessel comes suddenly and without warning into imminent peril of a collision—*e. g.*, where two vessels approaching are concealed from each other by intermediate objects until they are close upon each other,—the necessary uncertainty and confusion created by the surprise is to be taken into account in determining whether the management of the respective vessels is proper or blameworthy.

THIS was a libel *in rem*, filed by the Hoboken Land and Improvement Company, owners of the steam ferry-boat Fairy Queen, against the steamboat Columbus, to recover damages for a collision between the two boats.

The collision in question occurred in July, 1848, on the New York side of the river, off the slip of the Fairy Queen, then engaged in plying from New York city to Hoboken. The ferry-boat was so much injured that she sunk immediately. The pleadings upon each side imputed the accident to the negligence, want of precaution and culpable conduct of the other boat. The circumstances of the case are stated in the opinion.

Cambridge Livingston, for the libellants.

H. B. Cowles, for the claimants.

BETTS, J. I am not satisfied, upon the proofs or arguments adduced by the claimants, that the libellants were guilty on the occasion of the collision of any misconduct or negligence which led to the disaster, or which ought to screen the claimants if a fault is established against their vessel.

The Fairy Queen left her berth on the south side of the slip at the foot of Christopher-street, at half-past 4 P. M., that being the fixed time for her departure to perform her trip to the opposite landing at Hoboken. At this time, the Pioneer, another ferry-boat, run by the libellants, was lying to, out in the river, opposite the slip, prepared to enter as soon as it should be vacated by the Fairy Queen. Although the Pio-

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neer was not the consort of the Fairy Queen upon the same ferry, yet the two boats were in the habit of occupying the New York slip alternately, each having a fixed period for leaving it, and usually coming into it also, at a known time. The Columbus, the steamer proceeded against, plied daily up and down the river, having regular places of stoppage at docks above and below and in the vicinity of the landing and starting-place of the Fairy Queen; and her stated time of passing that point was half-past four, P. M.

The tide was ebb and nearly at low water. The Fairy Queen was a small low boat, and was thus, at the time in question, brought so far down below the surface of the pier that vessels north of it and near the docks could not be seen from on board her until she moved outside the wharves. The wind was northwest, and the Fairy Queen came out of her berth, heading N. W., in order to pass astern of the Pioneer, and another vessel anchored nearly abreast of the pier, a distance of one hundred yards off. Immediately after leaving the pier, it was discovered upon the Fairy Queen that the Columbus was opening from Hammond-street pier above, about two hundred feet out from the docks, and was apparently coming directly upon the Fairy Queen. The engine of the latter boat was then immediately stopped and backed, and she receded a short distance towards the slip, with intent to get back into it; that being found impracticable, in order to lessen the peril of the collision, her engine was again reversed, and an attempt made to move ahead, when the stem of the Columbus struck and perforated the Fairy Queen, and caused her to sink immediately.

The number of steam craft in this harbor, running in and out of its various slips at all hours, some at fixed times and others indefinitely, renders it important to the common safety of navigation along the wharves, that the law regulating their movements, in approaching and leaving the slips, should be well understood and strictly enforced. That consideration

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calls for a fuller notice of this case than its special difficulties would demand.

A steamer, although appointed to go out at fixed periods, is bound to remain in her slip, notwithstanding the time of her departure has arrived, if a vessel is seen, or is in a position to be seen outside, which she will be in danger of striking if got under way at the time. But she is not compelled to lie waiting the expected arrival of another vessel, whose period of return to the same point or known time of passing it is about to expire. The evidence goes no further here than to fix about the usual time the Columbus passed that point daily, and shows that a variance of ten or fifteen minutes in her arrivals was not unusual. It also proves that two minutes would be sufficient time to carry the Fairy Queen out of her way, after she reaches the place where she may be seen approaching.

The Columbus was not discovered in that interval of time on this occasion, because a vessel, loaded with hay, lying at the end of Charles-street pier, intercepted the view from the Fairy Queen in that direction. When the Columbus came out from behind that vessel, and the ferry-boat had passed out of her slip sufficiently far to bring the Columbus in sight, the two boats were found in such hazardous proximity, and the danger of collision was so imminent, as naturally to create uncertainty and confusion on board the ferry-boat, and in my opinion, the collision cannot rightfully be charged to any culpable misconduct of her's, if an hypothesis may be framed upon which a different course would have freed her from the danger. She did what in the exigency seemed to offer a chance of rescue, and whether any thing else could in reality have better served to that end, must be only matter of conjecture.

The claimants have not, therefore, in my judgment, succeeded in protecting themselves, by showing that the collision was produced by any blamable omissions or acts of the Fairy Queen.

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But to throw upon the claimants the consequences of this disaster, more is incumbent upon the libellants than to prove themselves clear of blame ;—they must make it manifest that the loss was occasioned by the fault of the Columbus.

This steamboat made daily trips between New York and Sing Sing, landing both ways at Hammond-street dock, a distance of one thousand feet north of Christopher-street pier.

The landing had that afternoon just been made, and she was under way towards her berth at Chambers-street, moving at a slow rate, about two hundred feet out from the docks.

Two or three vessels were lying at anchor below Hammond-street, and one hundred yards or more from the docks. The steamboat Pioneer was running a few yards ahead of the Columbus, on her starboard side, and close outside of the anchored vessels. About opposite, or slightly above Christopher-street, and just astern of the vessel anchored lowest down, the Pioneer changed her course to come into the slip, when the engine of the Columbus was immediately stopped and reversed, and worked back with all its power till the collision occurred.

The witnesses differ in opinion as to the exact place the Columbus had reached when the collision took place. The pilot of the Pioneer thinks it was opposite Charles-street. The pilot and engineer of the Fairy Queen place her below Amos-street ; whilst witnesses on the Columbus suppose her at Charles-street, or between that and Amos, or against the Amos-street cross-pier. No witness supports his estimate by any collateral fact which gives certainty to it. The differences in estimates may arise from looking at and from different parts of the Columbus, (she being one hundred and eighty feet long, and nearly or quite extending over the space between the two slips,) or from oblique ranges of vision, or from a few seconds difference of time in observing her, when the impetus given by the wind and tide would necessarily urge

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her forward with considerable rapidity. Either of these circumstances might reasonably account for the disagreements of the witnesses in this particular. The Columbus was managed in this respect solely with regard to the movements of the Pioneer, and to avoid coming in contact with her. The Fairy Queen was first noticed from the Columbus, after the order had been given to back the latter, and when the former was just showing herself beyond the end of the pier, and moving out of her slip.

Upon this evidence there is no ground for imputing blame to the Columbus, in the measures taken or omitted by her, after she and the Fairy Queen came in sight of each other. The measures she took in order to avoid the Pioneer were those which would have been demanded of her had she been acting in respect to the Fairy Queen, also, and for the supposed omission of which, her coming upon the latter is imputed to her as a fault.

Nor is the Columbus chargeable with want of precaution in advancing so near to the Fairy Queen, without discovering her. The reasons assigned by the libellants as an adequate excuse to the Fairy Queen for not discerning the Columbus, equally enure to the protection of the Columbus. The sloop lying between the two boats interposed the same obstacle to the view of each. The Columbus was not called upon to notice the position of the Fairy Queen, or her probable purposes, until she showed herself in motion; and it is clearly proved that did not occur until the engine of the Columbus was already reversed, and she was in the act of working back to avoid the Pioneer. This was the appropriate and only means in her power for protecting the Fairy Queen also. The Columbus was on a track safe for her to run, and the most prudent watchfulness would exact no more from her than to guard against vessels under way or lying at anchor outside the slips. She had a right to rely upon the presumption that her position and direction would be observed by any

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vessel desirous to get under way, and that such vessel would not put out to cross her track without being sure of sufficient distance and speed to render such movement safe. It would have been gross remissness in each boat to have pressed ahead in their relative nearness to each other, had no accidental impediments prevented their discerning those movements at the moment. The *Fairy Queen* would have been culpable in leaving her fastenings before the other was clear of her track, and the *Columbus* guilty in continuing her headway when it must have been dubious whether she had room to pass the ferry-boat safely.

Upon the testimony, I regard the collision as a pure casualty, so far as the agency of the *Columbus* was concerned, attributable to no fault or negligence on her part, and that she is, therefore, not liable to respond for the damages arising from it.

The matter of costs is undoubtedly very much under the discretion of the Court. *Canter v. The American Insurance Company*, 3 *Pet.* 307; *The United States v. The Brig Malek Adhel*, 2 *How.* 210. The general principle is, as at law and in equity, that costs, in causes of damage, in this Court, follow the decision. *The Ebenezer*, 7 *Jur.* 1117; *The Athol*, 1 *W. Rob.* 374. In cases of collision, however, the usage is to charge them upon the party most to blame. *The Celt*, 3 *Hagg. Adm. R.* 321. If neither party is found culpable, each pays his own costs. *The Washington*, 5 *Jur.* 1067. In the English Admiralty, where both vessels are to blame, it would seem that the costs are imposed on both in common. *Ib.*

No fault is fastened upon the *Fairy Queen* in this case, and accordingly each party must pay his own costs.

Decree accordingly.

TRUESDALE v. YOUNG.

Whether, under the established usage among steamboats plying upon the Hudson River, the mere hiring of a pilot at monthly wages, effected prior to the commencement of the season of navigation, carries with it an implied engagement that the employment shall continue throughout the entire season,—*Query?*

Whether such engagement could be implied where the hiring was effected after the season was partly over,—doubted.

Where, in the case of a contract for services in which no definite term of service is expressed, there is proof that the party claiming to have been hired as pilot represented the engagement was terminable at his option, this affords a strong presumption that it was terminable, also, at the option of the other party.

THIS was a libel *in personam*, by Verdine Truesdale against Jacob Young, to recover wages as second pilot on board the steamboat Oswego.

The libel stated, that in May, 1848, the respondent, then being in command of the steamboat Oswego, engaged in towing between New York and Albany, hired libellant to serve as second pilot on the boat, at the wages of forty dollars a month and board; that by such engagement the libellant became hired *for the remainder of the season*,—that is, until January 1, 1849; and that he was unjustly discharged September 1, 1848. He claimed to be entitled to wages for the remainder of the season, including board, amounting to \$228.

The answer of respondent set up as a defence, that the employment was merely *temporary*, and during the consent of both parties. That libellant was a connection of his through the marriage of relatives, and was, as he had understood, destitute of employment and means of support; that libellant applied to him for temporary employment until he could find a situation; that he took libellant into the employ of the boat for so long, only, as his services should be required,—the libellant being also under no obligation to remain longer than he chose,—and that he dismissed libellant, September 1st, because he did not consider him competent to perform pilotage service

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in the fall months, during which the difficulty of the navigation is increased.

Upon the trial, January 3, 1849, it appeared that the libellant was employed in May, 1848, and discharged September 1st, following. It also appeared that he had meanwhile made some efforts to obtain other employment, and had expressed some intention of leaving the Oswego. It did not appear that the engagement of libellant was definite as to time. But to show that it was an implied engagement until the close of the season, the libellant relied upon evidence of a usage on the Hudson River, in steamboat navigation, that pilots employed at monthly wages were understood to be employed for the entire season. The proper construction of the contract between the parties, in view of this usage, was the principal question in the case, and the chief evidence in reference to the usage was as follows:—

Edward L. Van Buren, testified. I was first pilot on board the Oswego during the season of 1848. I have followed the business of pilot on the Hudson River for twenty years. The employment of a pilot on the river is usually considered to be a hiring for the *season*; that is the custom of steamboats upon the river. The season ends January 1st. It is the custom of the tow-boat lines to employ first officers for the entire season of ten months. I am *not* employed by the season.

John Van Arsdale. My business is that of pilot upon Hudson River steamboats. The custom upon the river is to hire pilots for the entire season, from March to January 1st.

Henry Verplanck. I have been first and second pilot for fifteen years. The custom of the river is to hire pilots for the season of ten months, beginning March 1st.

Other witnesses gave evidence to the same purport respecting the alleged custom. Testimony was also given, touching the services of the libellant and his competency as pilot.

Edwin Burr, for the libellant.

C. Van Santvoordt, for the respondent.

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BETTS, J. The libel in this case is based upon an alleged hiring of the libellant, as second pilot, by the respondent, master of the steamboat Oswego, *for the season*.

The answer denies that any such agreement was made, and alleges that the libellant being out of employment, the respondent from motives of friendship, and because of marriage connection, gave him *temporarily* the place of second pilot on the boat, and for so long a time only as his services should be wanted.

On the first of September, the respondent informed the libellant that his services would no longer be required. The libellant two days thereafter offered to respondent to continue as second pilot during the remainder of the season, and claimed the right to the place. The respondent declined to retain him; and this suit is brought to recover wages for the months of September, October, November, and December.

There is no proof by the libellant that an express agreement was made with him for any definite term of services. There is evidence conducing to prove an established usage and course of business among the steamboats upon the Hudson River, to engage pilots and engineers at monthly wages for the season, which is considered to extend from March 1st to January 1st, and to pay them for the entire ten months, although the boats may not continue to run during the whole period. But the testimony is not explicit or clear that this mode of payment obtains in cases where it is not a part of the express bargain that the hiring is for a season. And I am not prepared, upon the evidence adduced in this case, to pronounce that a mere hiring of a pilot at monthly wages, upon the Hudson River boats, implies, by the usage and custom of the business, that his compensation shall continue throughout the entire season. This point has been before the Court in a previous case. The Hudson, (*MSS.*) 1846.¹

¹ Since reported, *Olcott*, 396.

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If such custom prevails in respect to engagements made previous to or at the commencement of the season, there would be stronger grounds for the Court to sanction and enforce it, than would exist if the pilot or officer is taken into service after the season has in considerable part expired. The usage proved relates to employments beginning with the season; and in such case, if it falls short of a fixed custom, a stronger presumption would arise that the engagement embraced the entire season, than when the hiring is at monthly wages in the progress of the season, and after it has nearly elapsed. The pilot is then without a place, and the opportunity to seek one from among the whole body of steamboats is no longer open to him. Moreover, it will not be implied that a general usage of that character would include and govern the chance occasions for hiring a pilot as a supernumerary, or to replace another temporarily, which the conveniences of navigation must render frequent. Whatever, then, might be the effect of taking a pilot on the Hudson River at monthly wages, without stipulation of time, prior to the first of March, I am by no means prepared to say, upon the proofs produced in this case, that such employment, at any after period of the year, will create rights or responsibilities in respect to either party, beyond an agreement for services and compensation in ordinary cases of hiring.

This case cannot, however, be justly regarded as resting upon implication or presumption as to the intention of the parties. The evidence in the cause sufficiently shows an engagement terminable at the option of the respondent. The libellant was not by profession a pilot, and he leaves it at least equivocal upon his own evidence whether he had ever before acted in that capacity. He had for many years been master of sailing vessels and steamboats employed on the Hudson River and elsewhere, having passed three or four years of the intermediate time in keeping a public house, established near the Highlands. But even his character as captain in vessels

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of the description mentioned, would not import any ability or experience as pilot. The evidence shows that masters of steamboats are not charged with the duty of navigating them. And although upon the Hudson River, such duties are performed by masters of steamboats occasionally, and frequently by masters of sailing vessels, yet in neither case does the mere holding the place of master import any nautical skill or experience.

It is clear, from the testimony of Mr. Van Buren, the pilot of the Oswego, and who was examined on behalf of the libellant, that the respondent did not consider the libellant qualified to fill the place of second pilot at the time he was engaged and taken on board the steamer. Placing him in that position, under such circumstances, raises the presumption that he was taken temporarily or upon trial, to determine his capacity for the station, rather than absolutely assigned to the post of second pilot for the residue of the season.

The declarations of the libellant, made after he entered upon this service, to the witnesses King and Whittemore, confirm the inference that a temporary engagement only was contemplated by the respondent; and they show, also, that the libellant did not consider himself committed to any definite period of service. To King, he stated in June that he was making interest for a different employment in New York, and did not intend remaining with the Oswego longer than until he could get a better situation. This declaration was made on board the boat, and the libellant added that others besides himself were looking out for such a situation for him, importing that it was understood he was attached to the boat but temporarily.

To Whittemore, he stated early in August, and on board the boat, that he expected to leave her, and advised him to go down in her from Albany to New York, and obtain the berth which he occupied. He alluded to the office of harbor-master as one which he and others expected would be obtained

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for him. The witness does not recollect whether the libellant specified the time at which he intended to leave the boat. But after that conversation the respondent wrote him at Albany, desiring to employ him as second pilot; and the witness, in compliance with that request, came from Albany in the boat, on the first of September, in that capacity. The libellant was then on board, and came to New York, but made no remark to witness relative to the latter having displaced him. Neither pilot exacted any services of the libellant during the trip, nor is it shown that the respondent put him to any duty, though the first pilot says, once on the trip he saw the libellant rendering some assistance on the deck.

I think, upon the whole evidence, it is manifest that the libellant well understood he was engaged only provisionally, and was at liberty to leave the boat whenever he chose to do so. There must be strong and clear proof that the respondent bound himself absolutely to more than was secured in his own behalf against the libellant. In the absence of such proof, the presumption will be that the contract was reciprocal in respect to the right of each party to hold the other for a definite term, as also to the right of each to terminate it at his option.

So far from showing an obligation upon the respondent to retain the libellant in the service of the boat during the entire season, I think all the testimony tends to prove a mutual understanding that the libellant was engaged for so long a time only as the respondent should see fit to employ him, with a correspondent right on his part to seek other service, and leave the boat at his pleasure.

It ought, probably, to be added, that, in my opinion, the evidence fairly imports that the engagement was terminated by the libellant himself, as it is no more than reasonable to infer that he gave the respondent notice of the communication made by him to Whittemore, in August.

The libel must accordingly be dismissed with costs.

ZEREGA v. POPPE.

Under a bill of lading which acknowledges the receipt of goods for transportation in good order, the carrier may, notwithstanding, show, in case of injury to the goods, and as against the owner of them, that it was occasioned by insufficiency in the cask, case, &c., in which they were packed, and not by any negligence or misfeasance upon his part.¹

But the law presumes that the goods were delivered to the carrier in the condition specified in the bill of lading; and the burden of proof lies upon the carrier to rebut this presumption.

It is not sufficient, in case of damage to goods received under such a bill, for the carrier to show that the goods were delivered to him in insufficient packages, and that the defect was not discoverable by him. He must also show that the loss actually resulted from such insufficiency, and from no fault of his.

THIS was a libel *in personam*, by Augustus Zerega, Thomas Andrews, and Isaiah C. Whitmore, owners of the ship James H. Shepherd, against Edward Poppe and Theodore Poppe, to recover the freight of thirty-two casks of linseed oil, shipped on board the James H. Shepherd, at Antwerp, and consigned to the defendants at this port.

The goods were shipped under a bill of lading, in French, of which the following is a translation :—

I, J. Ainsworth, captain of the American ship James H. Shepherd, at present at Antwerp, bound for New York, acknowledge to have received on board my said ship, *in good order*, from Messrs. F. & J. Badart Frères, thirty-two casks of linseed oil, containing together twenty thousand and sixty-three litres, which I bind myself to deliver at the said place, *well-conditioned*, excepting the perils of the sea, to order, they paying me for freight two American cents per gallon, and no more; for the accomplishment of which I bind myself, my

¹ Compare, also, on the right to explain a bill of lading, *Manchester v. Milne*, *ante*, 115; *Goodrich v. Norris*, *ante*, 196; *Baxter v. Leland*, *ante*, 348.

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property, and my said ship, freight and equipment, and have signed four receipts of the same tenor and of one effect.

Done at Antwerp, March 10, 1848.

Contents unknown—*not accountable for leakage.*

JAMES AINSWORTH.

Thirty-one of these casks of oil were safely delivered to the respondents, the consignees, in New York. The other cask was found, on unloading, to have been broken, and its contents had escaped. The consignees, considering that the value of the oil lost, including duties paid upon the lost oil, as a part of the invoice, exceeded the amount due for freight, and that the carriers were liable for the loss, refused to pay the charges for freight, and this suit was accordingly brought by the ship-owners, to recover it. The amount claimed was \$89.20. Other facts appear in the opinion.

Mortimer Porter, for the libellants.

Edgar Logan, for the respondents.

BETTS, J. This action is by the owners of the ship James H. Shepherd, to recover the freight of thirty-two casks of linseed oil from Antwerp to New York. Thirty-one of these casks were delivered to the defendants, as consignees. One cask, of the capacity of two hundred and six gallons, was found, on discharging the vessel, to be broken, and its contents had leaked entirely out. The value of the oil lost, including sixteen dollars duties paid upon it by the consignees, exceeds, it is contended, the amount of freight stipulated for the transportation of the thirty-one casks. And the question between the parties is, upon which this loss shall fall.

The liability of the ship-owners is fixed *primâ facie* by the bill of lading, as between the parties to it; and considering the defendants to have no other rights than those of the owners of the goods shipped, the burden is on the respondents to show an adequate excuse for not delivering the entire cargo,

conformably with the terms of the bill of lading. *Abbott on Shipp.* 323; *Curtis on Merch. Seam.* 169. The acknowledgment by the bill of lading that the cargo was received in good condition is *prima facie* evidence that, so far as indicated by the external appearance of the casks, it was in good order when laden on the ship. It is not, indeed, conclusive upon the libellants. They are at liberty to show that the loss resulted from inherent insufficiency or concealed defects in the cask, or other facts constituting an adequate cause for its breakage, without fault or negligence on their part. It, however, devolves upon them to supply satisfactory proof that the admission made in the bill of lading is inaccurate, and that this cask was not received by the ship in good condition.

The exculpation set up is, that the cask, when sent to the ship, was rotten and insufficient to bear the weight of oil in it, and the handling necessary for lading and unlading it. Such defects of the cask, not discernible to the carrier on an ordinary examination, will undoubtedly relieve him of responsibility in case of the loss of its contents in the course of transportation. *Story on Bailm.* § 492. But this insufficiency of the package, and the fact that it was the cause of the loss, must be proved. It is not to be presumed from the circumstances that the goods were not safely delivered.

The libellants have undertaken to establish the fact, by proving the broken cask was in appearance old, decayed, and rotten; and from that condition of infirmity, they contend the leakage was owing to the insufficient state of the cask, and not to any negligence or improper act of the master or crew.

It is not necessary to consider the pertinency and weight of those suppositions and inferences, for the libellants have not succeeded in showing that the injury to the cask did actually arise from its insufficiency to sustain the ordinary treatment of lading and stowage on board. Several respectable and intelligent witnesses have been examined, who ex-

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press the opinion, that from the present state and appearance of the broken stave, it would not have borne rolling over a stone or other hard substance, in getting it to the ship, or being let down heavily on dunnage of wood in the course of stowage. The stave was crushed inwardly near the bilge. The fracture was manifestly caused by the cask encountering a sudden shock or pressure. The ligaments of the stave are severed by being driven inwardly in a splintered state, but held in contact without being actually broken short off. Some of the witnesses inferred this appearance of the fracture was caused by prying the cask with a lever of iron or other hard material, in endeavoring to lift it or move it in stowing; but all agree that the break could not result merely from the resting of the cask on its bed and supporters, in the manner the evidence shows it was dunnaged on board. This testimony displaces all ground of presumption that the breakage arose from any inherent defect of the cask. The opinion of all the witnesses and the exhibition of the stave, demonstrates that the fracture must have been produced by considerable external violence, and could not result from the working of the cask in its place on board.

Admitting, then, that the shippers were bound to supply casks of strength sufficient to bear the ordinary usage in stowing, it is incumbent upon the libellants to prove that this one came to the ship in a broken state, or in such condition that the loss befel it without any act of carelessness on their part. The call upon them to make this proof is pertinent and the more stringent, as it appears that, before the cargo was exposed to sea-perils, the pumps threw up oil from the hold, and on examination of the stowage at the time, this cask was found empty. The strong presumption upon the evidence is, that the injury happened in lading the cask on board, while it was under the responsibility of the respondents.

It is to be remarked, that the opinions of witnesses respecting the inherent defectiveness of the cask are strongly contra-

dictory, and the indirect evidence from that source must be received with great caution. Many coopers and others, experienced in this business, pronounce the cask a sound and sufficient one for the transportation of oil. Some consider its long use as a whale-oil cask tended to strengthen it, and that it was at that time as sufficient to carry linseed oil as when new, whilst others considered its long service had softened and enfeebled the stave so as to destroy its tenacity. Those who carefully inspected the stave, and picked the fibres of wood in presence of the Court, disagree in their opinions whether there was any decay or want of strength in it. The weight of evidence in point of numbers is, in that respect, with the respondents.

I think the libellants have failed to prove that the loss of the oil in this case was owing to the defectiveness and insufficiency of the cask, and the respondents, on their part, have proved no more than that it was carefully and safely stowed, and that the fracture cannot reasonably be ascribed to improper stowage; that, however, does not satisfy the bill of lading, nor excuse them from delivering the entire cargo.

The decree must accordingly be, that the value of the oil be deducted and allowed the respondents against the demand of the libellants for freight.

If the parties do not agree between themselves in the adjustment of the amount, let a reference be taken to a commissioner to state it.

If the loss equal in amount the freight, a decree will be entered dismissing the libel, with costs; if a balance remains payable to the libellants, they will take a decree for the amount, with costs.

• Bucker v. Klorkgeter.

BUCKER v. KLORKGETER.

The maritime courts of this country and of England are not without jurisdiction over actions, whether *in rem* or *in personam*, between foreigners.

But as a general rule, both the American and English courts will decline to entertain such actions, excepting where it is manifestly necessary that they should do so, to prevent a failure of justice.

A stipulation in shipping articles, by which the master and crew of a foreign vessel, about to sail to this country, agree that they will not sue in any courts abroad, but will refer all disputes to the courts of their own country for adjudication, is lawful and binding, and will, in general, be respected and enforced by the American courts.

But where the interests of justice require it to be disregarded—*e. g.*, where the voyage is broken up in an American port, by some other cause than the wreck of the vessel, or where the man is discharged or becomes entitled to a discharge by reason of improper treatment—the American courts will entertain a suit by a foreign seaman for his wages, notwithstanding his stipulation in the articles not to sue until his return home.

Under the practice in this country, the approval of the consul, or other representative of the nation to which foreign seamen belong, is not absolutely necessary to the maintaining of a suit between them.

It seems that a deviation from the voyage for which foreign seamen shipped, is not a ground upon which our courts should entertain jurisdiction of a suit for wages, where, by the articles, the libellants have stipulated to sue in their own country only.

Unseaworthiness of a vessel releases the crew from obligation to sail with her; and on showing such condition of the vessel, and that they left her on that account, they may maintain an action *in personam* for wages here, although all parties are foreigners, and are under agreement not to sue while abroad.

A report that a ship is seaworthy, made by marine surveyors, upon occasion of the crew demanding to leave her for unseaworthiness, is not conclusive against the crew, in a subsequent action for wages, after leaving.

THIS was a libel *in personam*, by Gerhard Bucker against Henry Klorkgeter, master of the bark Pacific, to recover wages as seaman.

The libellant, a foreigner, shipped at Bremen on board the Pacific, for a voyage to New York, elsewhere and back. Articles to that effect were signed by him. The original agreement and an admitted translation of it were put in evidence

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in the cause. By the terms of the agreement, the libellant bound himself, under penalty of forfeiture of wages, not to leave the vessel abroad, and not to ask his dismissal nor any wages due, of foreign courts; and also agreed, that if any difference arose between himself and the master, he would bring no action therefor, excepting in the courts of Bremen, after the end of the voyage; and that he would appear in the courts of Bremen and await their sentence in reference to his services and duties.

The Pacific, after arriving at New York, was despatched to Havana, and returned thence to New York. The libellant performed both voyages in her.

She was then loaded and made ready for a voyage to Madeira. While she was lying in the North River, the crew, including the libellant, refused to go in her, alleging that she was unseaworthy, and they demanded a survey. Marine surveyors were accordingly called in to examine the ship. After trying the pumps, and finding that although she leaked, she did not make water so fast but that she could be kept free with about five minutes working of the pumps per hour, they certified that she was seaworthy. The respondent and the Bremen consul then required the crew to make the voyage; but they, including the libellant, refused to go in her, still insisting that she was unsafe and unseaworthy.

Another crew was then shipped and the bark put to sea. In about five days she returned in distress. She had encountered heavy weather during this absence, in which she was much strained. A more careful survey was then had, and she was pronounced unseaworthy; and her cargo being unladen and her hull examined, she was found rotten throughout, and not worth repairing. Her hull and masts were sold at auction for \$25, and on the same day were resold by the purchaser for \$200, to be broken up, they being found useless for any other purpose.

The respondent refused to pay the libellant his wages, and

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no provision was made by the Bremen consul for his support here, or for his return home.

E. C. Benedict, for the libellant.

I. The crew were under no obligation by the articles to go with the vessel to Madeira. The articles did not bind them to return to New York after leaving it for another port; nor were they bound to go from New York to more than *one* other port. This obligation they had already fulfilled by the trip to Havana; and the attempted voyage to Madeira was a deviation from that contemplated by the articles.

II. The stipulation in the articles referring all matters in dispute to the Bremen courts, rests evidently upon the assumption that the vessel would return to Bremen. The contract is, that the libellant will bring no action except in the courts of Bremen, after the end of the voyage. This contemplates a return to Bremen; and the stipulation can have no application under an emergency wholly unprovided for by the articles, namely, the entire breaking up of the voyage in this country.

III. The failure of the voyage by the unseaworthiness of the ship brings the case within a well-recognized exception to that general doctrine, that the courts of this country will not interfere in the disputes of foreigners. The seamen had a right to leave the vessel if she was unseaworthy. It is true the presumption is against them upon this point; but if upon the trial the libellant has proved her unsafe at the time when he left her,—which has clearly been done,—he has established his right to refuse to sail. The certificate of the first surveyors does not prevent libellant from showing the ship to have been in fact unfit to sail.

T. Tucker, for respondent.

I. The stipulation in the articles is lawful, and should be enforced in this Court by a dismissal of the suit. *Thompson v. The Catharina*, 1 *Pet. Adm. R.* 104; *Willendson v. The Försöket*, *Id.* 197.

II. Moreover, this Court will not take cognizance of controversies between foreigners, even in the absence of such agreement.

III. The certificate of the surveyors upon the first survey was conclusive upon the men, as to the condition of the vessel. That she was afterwards found unseaworthy is not surprising, nor is it inconsistent with the truth of the first certificate, when the evidence as to the weather encountered by her during the attempted voyage to Madeira is taken into view. The leaving the vessel after the surveyors had reported her in good condition was a forfeiture of the wages claimed.

BETTS, J. An exception is taken on behalf of the respondent to the jurisdiction of the Court in this case, upon two grounds:—

1. Upon the general ground that maritime courts will not entertain suits for wages brought by foreign seamen against foreign masters or owners.

2. Upon the terms of the shipping articles, by which the libellant agreed that if any difference arose between him and the respondent, he would bring no action therefor, except in the courts of Bremen, after the end of the voyage; and that he would appear in the courts of Bremen, and await their sentence, in reference to his services and duties.

In respect to the question raised by the first objection, it is sufficient to say, that the nature and limits of the jurisdiction of Admiralty Courts of the United States over suits between foreigners have been several times brought under careful consideration in this Court. And while I recognize very sufficient reasons why our courts should, in general, decline to take jurisdiction of such controversies, yet I am clear that the *power* exists, and that the Court may hear and determine an action of this description between foreigners, whenever the general interests of justice demand that it should be done.

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The reasons for this view were fully stated in *Davis v. Leslie*,¹ (MSS.) 1848.

A further question arises, however, upon the effect of that stipulation in the shipping articles which limits the libellant, in case of controversy, to a resort to the courts of Bremen for redress.

Such stipulations in the shipping articles are regarded by the American courts as valid. A contract by which the seaman binds himself not to sue in any case, or not to sue in the proper court, or in the courts of his own country, is not to be supported. But a stipulation in a shipping contract between foreigners, by which the parties bind themselves not to sue except in the courts of their own nation, is lawful and should be sustained. *Thompson v. The Catharina*, 1 *Pet. Adm. R.* 104.

And I believe it to be the recognized doctrine, as now established in our courts, in respect to suits by foreign seamen for their wages, where the shipping contract contains a provision of this kind, that if the contract remains in force, and the voyage is yet unended, the courts will decline jurisdiction, especially if the suit is not sanctioned by the representatives, diplomatic or commercial, of the nation to which such seamen belong. *Abbott on Shipp.* 786 and note; *Curtis on Merch. Seam.* 359 and note.

The English and American tribunals, however, never decline jurisdiction in these cases, when the voyage is broken up, or the seamen discharged, or other emergency has occurred, entitling them clearly to their wages. A leading authority on this point is the case of *The Wilhelm Frederick*, (1 *Hagg. Adm. R.* 138,) between which and the case now before me are many points of resemblance. That cause was instituted against the ship by the seamen for their wages.

¹ Reported *ante*, 128. See, also, *The Napoleon*, *Olcott*, 208; *The Infanta*, *ante*, 263; *One Hundred and Ninety-four Shawls*, *ante*, 317.

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The owners appeared under protest to the jurisdiction, based on the following facts: The owners were subjects of the King of the Netherlands, and the ship was a Dutch ship. Previous to sailing from Amsterdam, the crew had stipulated by the shipping articles that none should have a right to take proceedings at law against the master in foreign ports, but all disputes and complaints against the master should be settled or prosecuted on arrival in their own country. In case the ship while abroad should be sold, or condemned, or the continuation of the voyage be suspended, so as to render it necessary to discharge the crew, the master was to make a settlement with every one upon terms prescribed in the articles, and no one should claim a larger sum; and in case the master should be remiss in the performance of his duty, the injury was to be made good at Amsterdam. On the arrival of the ship at Cowes, she was surveyed; and, in consequence of the damage she had received, was found to be utterly unable to proceed on her voyage, the further prosecution of which was, therefore, abandoned, and the men discharged on a tender of wages and a passage home, which they refused. The owners abandoned the ship to the discretion of the master, who assigned her in trust to pay the wages, and for other purposes. The protest to the jurisdiction was overruled. Lord Stowell says: "The owners had abandoned the ship to the discretion of the captain, who assigns her over to British creditors, at Cowes. Here, then, was a disclaimer by the owners of their own articles of agreement; their contract with the seamen was at an end; and I am satisfied that the seamen may, under these circumstances, proceed on the general law to establish their claims."

On similar grounds, actions by foreign seamen for wages have been sustained, notwithstanding such stipulations, by the English common-law courts. In *Sigard v. Roberts*, (3 *Esp.* 71,) and in *Limland v. Stephens*, (*Ib.* 269,) the plaintiffs were under articles which contemplated a settlement of dis-

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putes between the master and crew in the courts of their own country only ; yet in both these cases the action in the Court of King's Bench was sustained, upon the ground, in the first case, that the master had discharged the seamen ; and, in the second, that the seaman had received ill treatment from the master, which entitled him to a discharge. This jurisdiction is also sustained by a *dictum* of Mr. Justice Le Blanc, in *Hulle v. Heightman*, 4 *Esp.* 75. But see *Gienar v. Meyer*, 2 *H. Blackst.* 603.

In the courts of the United States the same course has been followed ; and while, in general, our courts will respect and enforce a stipulation between a foreign master and his crew, which limits them to suing in their own country, they have frequently asserted both the power and the willingness to grant relief to a seaman, notwithstanding such an agreement, whenever the interests of justice demand that they should do so. Cases in which the voyage was broken up or ended in this country, or in which the men were discharged here, have been specified as those in which the courts would most readily enforce the payment of wages due, although, by the strict letter of his contract, the seaman was forbidden to ask their aid. *Aertsen v. The Aurora*, *Bee's Adm. R.* 160. In one respect, indeed, the American courts show a greater favor to seamen, in these cases, than do the courts of Great Britain ; for the former proceed, irrespective of any interference on behalf of the seaman by his consul or other national representative, whilst the English courts would seem still to insist that the sanction of such an officer to the action shall be procured, unless the nature of the case forbids. *The Wilhelm Frederick*, 1 *Hagg. Adm. R.* 138 ; *Edw. Adm. Jur.* 128.

I am clear that, notwithstanding a stipulation of this sort, the courts of the United States are open for the protection of foreign seamen, left destitute within their jurisdiction, by improper discharge, or by the breaking up of the voyage for any other cause than the wreck of the vessel.

I have never been disposed, however, to entertain jurisdiction in those cases in which the ground upon which the Court is asked to disregard the stipulation prohibiting the suit is a deviation of the foreign ship from the voyage contemplated in the articles. Judge Peters has, indeed, intimated that a gross deviation would be a legitimate ground for the interposition of the local courts. *Moran v. Bauden*, 2 *Pet. Adm. R.* 415; and see *Weiberg v. The St. Oloff*, *Ib.* 428. But I have always considered questions of deviation to be fitly referable to the home tribunals. They are best able to determine what the obligations and rights of the respective parties may be under the apparent change of the agreement.

I should not, therefore, entertain this action because of the proposed voyage to Madeira, upon which the bark entered, and her deviation thereby from the voyage described in the shipping agreement; and had the point been the right of the libellant to leave the vessel for that cause, I should have referred him to the courts of Bremen for redress.

This is not the case, however. The crew refused to serve on board, because of the unseaworthiness of the ship. They left upon that allegation, openly, and with the knowledge of the master and consul. This circumstance, also, takes away from their departure the character of a desertion, endeavored to be given to it by the defence. If done unwarrantably, the men may have incurred, under the law maritime, a penalty equivalent to the value of their wages; but the refusal to go to sea in a ship found to be leaking constantly, and which they desired to leave for no other cause, would not amount to a technical desertion. I think, therefore, that neither the position taken in favor of the libellant that he could rightfully abandon the vessel because of her deviation from the voyage agreed upon, nor that, on the part of the respondent, that the refusal to sail was a desertion, and involved a forfeiture of the right to wages, is maintainable.

The case then turns upon the question, whether the vessel

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was unseaworthy at the time of the libellant's refusal to sail in her; and I think it clear upon the evidence that she was. The slight and exceedingly unsatisfactory examination made by the marine surveyors, on giving their certificate of seaworthiness, even if it could operate to put the men in the wrong, in case no facts had afterwards been brought out respecting the condition of the vessel, cannot, nor can their formal certificate, avail against the clear and indubitable evidence furnished within a week after, that the ship must have been at that time totally unsafe to undertake the voyage she was to enter upon.¹ It is alleged that she encountered heavy weather in the short time during which she was out, and was greatly strained in it; yet if the fact were so, the state of the weather would have no connection with the condition of entire rottenness in which her whole body was found on her return. It cannot, upon the proofs, be matter for question, that the ship was not merely unseaworthy in a nautical sense, but was moreover unfit and unsafe for any navigation whatever.

The libellant took the risk of making out the unseaworthiness of the vessel, in justification of his refusal to remain by her; and having done so completely, under circumstances demonstrating that such was her condition when he asserted it and left her, he is entitled to every advantage that can arise from the clear establishment of that fact afterwards, with the same effect as if it had been brought to light at the time of her sailing. Manifestly one consequence is, that he was released from all obligation or duty to go to sea in her. And it follows no less certainly that the voyage being broken up because of the destruction of the ship for rottenness, the libellant is entitled to his wages upon his contract, as upon its full and faithful performance on his part. The stipulation to

¹ On the effect of a marine survey, see the authorities cited by *Smith*, *arguendo*, in *The Lucinda Snow*, *ante*, 305.

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refer all actions to the Bremen courts, contained in the articles in this case, relates, by its terms, to an anticipated ending of the voyage at that port. It cannot be accepted as governing the case of an entire breaking up of the voyage in a foreign country, by a sale of the ship, as in this instance, for incapacity to prosecute and complete it. To give that effect to the contract would be not only wrongful and oppressive to the seamen, but would render it deceptive and fraudulent in respect to their rights and remedies, inasmuch as the master would have it in his own power, by disposing of his vessel abroad, to cut them off from all recovery of wages. The master abandons the vessel in this port as worthless, and leaves the libellant to take care of himself;—accordingly he is liable for wages already earned, for the necessary support of the libellant here, and for means sufficient for his return home. It must be referred to a commissioner to ascertain these amounts, giving the respondent allowances for past payments, and for the earnings of the libellant since he left the vessel.

Decree accordingly.

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A female offered as a witness and objected to, upon the ground that she is the wife of the party calling her, cannot be examined to disprove the marriage when there is sufficient evidence *aliunde* before the Court to raise a presumption of marriage.

THIS was a libel *in personam*, filed by George Rose against Hiram Niles and John R. Wheeler, to recover seamen's wages.

The libel demanded wages for navigating the canal boat Emerald, owned by the respondents, from Troy to New York, and for remaining with and keeping her afterwards, upon an alleged agreement to pay libellant one dollar per day, with

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board, for these services. The answer denied the agreement charged, and that the services alleged were rendered.

The libellant offered the deposition of one Julia Kemble, taken out of Court in the cause, in support of the allegations of the libel. The respondents objected to it as incompetent, upon the ground that the witness was the wife of the libellant. To sustain the objection, they proved by several witnesses, that the proposed witness and the libellant cohabited together as man and wife, and had declared, in presence of each other, that they were married. It was also shown that the woman had on one occasion stated, in the presence of libellant, the time and place of their marriage, without contradiction from him. So also, the libellant had spoken of her to others as his wife, in her absence, but during the cohabitation.

The libellant then proposed to prove, by the deposition of Julia Kemble herself, that she was not his wife. This deposition the Court excluded as incompetent, and this ruling raised the principal question in the case.

A. C. Morrill, for the libellant.

F. F. Marbury, for the respondent.

BETTS, J. In my judgment, the *prima facie* proof of marriage made by the respondents, renders the deposition of the supposed wife inadmissible even to disprove the marriage.

There can be no pretence that the libellant is authorized to call in the testimony of his wife in his own behalf, and the only question to be considered is, whether a woman is a competent witness for a man, to disprove a marriage in fact with him, when there is sufficient evidence *aliunde* to establish a legal marriage between them. As a general rule, it is well settled that proof, such as was made in this case, of cohabitation, with admissions and reputation of marriage, authorize the presumption that a legal marriage was had. *Morris v. Miller*, 4 *Burr*, 2056; *Reed v. Passer*, *Peake's Cas.* 231; *Hervey v. Hervey*, 2 *W. Blackst.* 877; *Fenton v. Reed*, 4 *Johns.* 52; *Jackson v. Claw*, 18 *Ib.* 346.

It was formerly a subject of debate in the English courts, whether a woman who had lived in a meretricious state with a man, but under representations by him that she was his wife, was not an incompetent witness for or against him in all respects as if the parties were legally married. It was contended that in ordinary cases, and especially where the relation was still subsisting at the time of the trial, the testimony of the mistress was open to nearly the same objection on the score of interest, as that of the wife, since her testimony would tend to increase or preserve the fund to which she looked for her support. And it was also urged, with more force, that it was against public policy and morals to give to persons living together in an illicit connection, under the pretence that it was a lawful one, a power to aid each other by their testimony which was denied those cohabiting in the relation of husband and wife. And this view received some seeming sanction from a ruling of Lord Kenyon in 1782, (cited in *Campbell v. Tremlow*, 1 *Price*, 81.) The prisoner in that case was tried on a charge of forgery. Being a man of competent education, he addressed the Court in his defence with considerable effect. In the course of his speech, he frequently alluded to a woman who then accompanied him, and whom he spoke of as his wife; and he concluded by offering her evidence in corroboration of some facts which he had stated. When the objection of her being his wife was taken, he said, that they were not in fact married. But his Lordship would not permit him to call her, after having spoken of and represented her as his wife. And he was convicted and executed. In the case of *Campbell v. Tremlow*, (1 *Price*, 81,) the question was much discussed but not decided. In the case of *Bathews v. Galindo*, (3 *Carr. & P.* 238; 14 *Eng. Com. Law*, 284,) Chief Justice Best ruled at *Nisi Prius*, that a woman, living with a man as his wife, was incompetent to testify for him; but a new trial was granted on this point. 4 *Bingh.* 610; 15 *Eng. Com. Law*, 88. The Court were unan-

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imous in holding that the objection went to the credit of the witness only, and that the witness could not be excluded as incompetent. Chief Justice Best says: "The ground on which I think my decision at *Nisi Prius* wrong, is this, that the principles on which the rejection of testimony rests, have been greatly narrowed in late times, and are directed rather to the credit than the competency of witnesses. It is now generally agreed that the principles of our law of evidence are too narrow, and that much inconvenience is produced by a too frequent exclusion of testimony. The true principle to follow on such occasions is, that the witness is not to be excluded, unless *de jure* the wife of the party. Where the situation of the female may be changed in a moment, and is so different from that of a wife, who cannot be separated, it is much better that the objection should go to the credit than to the competency of the witness." And it is now regarded, I think, as settled in England, that the disqualification extends only to the case of parties united by a lawful marriage, or by a relation considered equivalent thereto.¹ 1 *Phil. Ev.* 48; *Stark. Ev.* Pt. 4, 711; *Roscoe Crim. Ev.* 147; 1 *Greenl. Ev.* § 339.

The same question was raised in 1820 in the Oyer and Terminer in New York city, before Van Ness, Judge of the Supreme Court; Colden, Mayor; and Jay, Recorder; in a capital case, (Randall's case, *City Hall Recorder* for 1820, 141.) The Court there held a woman an incompetent witness for the prisoner, he having cohabited with her, representing her to be his wife, although he gave evidence that they were not actually married, when by mutual agreement they commenced cohabiting together. This was undoubtedly carrying the rule to the extreme; and although decided by three most experienced and able Judges, the case would probably, on revision

¹ As, for example, where the parties have lived together believing themselves to be lawfully married, but the marriage is discovered to be invalid.

at this day, be qualified so far as not to hold the cohabitation and admissions conclusive as to their *status*, except, perhaps, in respect to the civil liabilities of the man and the rights of their children. It goes greatly beyond the present case, for here no evidence is offered to disprove the marriage except that of the woman herself. The Supreme Court of Massachusetts would seem to countenance the doctrine declared in Randall's case; for it held the reputed husband who offered evidence showing that a connection which he had represented to be lawful was in fact void, as being within the prohibited degrees, to be estopped from founding any advantage upon his own guilt or infamy. *Divoll v. Leadbetter*, 4 *Pick.* 220. See also *Mace v. Cadell*, *Cowp.* 232.

I suppose the true distinction to be, that while a party is forbidden to contradict representations of this character, in cases where third parties have acted upon such representations and cohabitation, by giving credit, or otherwise acquiring rights or incurring responsibilities, (1 *Greenl. Ev.* § 207; 2 *Ib.* 462,) such representations are not absolutely conclusive upon a mere question of the competency of one as a witness for the other, in a case in which the rights of third persons are not thus involved. I should, therefore, receive the deposition, if there were before me competent evidence that the witness was not in reality the wife of the libellant.

There is, however, a further question in the case; for the evidence on the part of the respondents amounted to *prima facie* proof of a marriage *de facto et de jure*; and the only evidence offered by the libellant to rebut this presumption, and remove the apparent incompetency, was the testimony of the supposed wife herself. But she already stood before the Court in the character of the lawful wife of libellant, and as such must be excluded from testifying for him until the disqualification is removed.

The only case I have seen which conflicts with this view is that of *Allen v. Hall*, (2 *Nott & Mc C.* 114,) where the Court

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declare that if the proof of marriage is only presumptive, the supposed husband and wife are competent witnesses to disprove it. As I understand that case, the presumptive proof of marriage which the Court ruled was conclusive unless rebutted, arose from cohabitation only. But if the case is to have a broader effect, and applies to all proof short of actual marriage, it would be difficult to sustain it, or even to reconcile it with the principle declared by the Court in that very case,—viz. that the parties are, by force of the presumption, proved, as respects themselves, to be man and wife. For while that relation subsists, they are incompetent to testify for each other.¹

¹ In the case of *Scheaph v. Szadeczky*, (1 *Abbott's Pr. R.* 366,) nearly the same question arose in the New York Common Pleas. That was an action for enticing away the plaintiff's wife. Evidence having been put in by the plaintiff, that he and the alleged wife had lived together as man and wife, were reputed to be such, and frequently admitted that they stood in that relation towards each other; the defendant afterwards offered to prove by the testimony of the alleged wife herself, that she had never been married to the plaintiff. It was contended (on the authority of *Peat's case*, 2 *Lew. Cr.* 288; *Wakefield's case*, *Ib.* 278; *Allen v. Hall*, 2 *Nott & McC.* 114; *Stevens v. Moss*, *Cowp.* 593; *Mace v. Cadell*, *Ib.* 232; *King v. Bromley*, 6 *T. R.* 330; *Poultney v. Fairhaven*, *Brayt.* 185; *Commonwealth v. Littlejohn*, 15 *Mass.* 413; *Phil. Ev.* 88 n. 163 and 192; 1 *Greenl. Ev.* § 339; to which might be added *Wells v. Fletcher*, 5 *Carr. & P.* 12; *S. C.* 24 *Eng. Com. Law*, 192,) that the evidence of marriage being merely *primâ facie*, the witness was competent to disprove it. It was held, however, that she was properly excluded; that, there being proof of marriage already in the case when she was offered as a witness, that proof was sufficient to establish the marriage, in the absence of all proof to the contrary, so far as to render the witness incompetent.

There may seem to be an inconsistency in the principle laid down in this case and in the text; and those cases where on an indictment for forcibly abducting and marrying a woman, such female has been received as a witness. This was done in *Brown's case*, (1 *Ventr.* 243,) upon the authority of *Fulwood's case*, (*Cro. Car.* 488. See also *The King v. Fezas*, 4 *Mod.* 8; *Bac. Abr.*, tit. *Marr.* and *Div. D.* 1; *Respublica v. Hevice*, 2 *Yeates*, 114,) where the female was admitted to prove the *force* used to accomplish the marriage; and also in *Perry's case*, (*Bristol Assizes*, 794, cited in *Macnally's Ev.* 181,)

The fact of marriage arising in cases before courts of law must, unquestionably, be determined by a jury; and because their determination of facts is more absolute and conclusive than the decision of a Court of Equity, Canonical, or Admiralty jurisdiction, being less open to revision and correction by appeal to higher tribunals, greater precaution is exercised in the admission of evidence, and its quality is more strictly scrutinized on jury trials, yet a common principle must prevail substantially with all courts in determining the legal character of evidence. And, as I understand the law of evidence, so long as a person stands in the relation of husband or wife, he or she is prohibited from testifying in behalf of the other. The disability must be removed by evidence from other sources. I hold, accordingly, that the deposition of Julia Kemble, offered by the libellant, is inadmissible.

The libellant further attempted to prove the allegations of his libel by the cross-examination of witnesses offered by the respondents. In this attempt he wholly failed. The deposition upon which he relied being excluded, his claim stands before the Court unsupported by evidence.

The libel must be dismissed with costs, but without prejudice to any action which the libellant may hereafter bring for the same cause.

where the female was examined on behalf of the prisoner, to prove the marriage *voluntary*. The true ground of these cases appears to be, that the prosecution must be allowed *ex necessitate* to call the female to prove the force, and that, as a necessary consequence, she is competent to disprove it at the call of the defendant.

McCormick v. Ives.

McCORMICK v. IVES.

A Court of Admiralty has not jurisdiction of an action to recover wages for services in a voyage upon a canal not connecting navigable lakes or different States or Territories.

Nor will the fact that a small portion of the voyage is through public navigable waters, give jurisdiction, if the main end contemplated by the contract was a service upon such canal.

THIS was a libel *in personam* for wages, by Edward McCormick against Edwin R. Ives and John Chambers.

The libel set out a shipping contract, whereby the respondents employed the libellant to perform a voyage in the canal-boat Camden, then in New York, to Buffalo, and back to New York,—principally between Albany and New York,—at \$20 a month; and then averred that in pursuance of the agreement, the libellant entered on board the vessel on May 4, 1848, and proceeded therewith to Albany, and thence back to New York; and so continued in the employ of the respondents until about December 1, 1848, when he was discharged. The libel claimed a balance of \$102.29.

William Jay Haskett, for libellant.

H. S. Mackay, for respondents.

I. The libellant must succeed on the case stated in his libel, or not at all. That proceeds on a hiring in a canal boat, destined on a voyage "from New York to Buffalo," and avers the services to have been performed "principally between Albany and New York." It avers, also, that the boat "proceeded with the libellant on board to Buffalo and back to New York." The libel, schedule, and proof show, that whatever services the libellant rendered, were in pursuance of an entire and indivisible contract, to serve in a canal boat on a canal route.

II. It follows from the first point, that the libellant could not, at the hearing, as he attempted to do, set up a new or

distinct demand, separate and separable in itself, by going for services performed on the river alone, irrespective of the general contract or hiring stated in his libel, and which was also shown by the proof.

III. The case, therefore, presents one of the hiring of a hand to serve on a canal boat on trips from New York to Buffalo, in the doing of which by far the greater portion of the services were rendered on the canal; in which case this Court has not jurisdiction.

IV. No decree can be given for that portion of the general services which were performed on the river, (admitting such to be of Admiralty cognizance,) 1. Owing to the indivisibility of the claim. 2. The want of allegation to support it in the libel. 3. The oppression and injustice which would result to both parties, by exposing them to two separate suits in two distinct tribunals for one and the same demand.

V. It is not necessary to plead the want of jurisdiction, as neither consent or acquiescence can confer it. Whenever the want of it appears, the Court must dismiss the suit. Although here the *protestando* with which the answer begins and the objection with which it concludes, do distinctly allege and set up the want of jurisdiction. That is in equity, and so here, an answering demurrer.

VI. But there is no jurisdiction in this case on other grounds. 1. A canal boat proper, such as this, belongs, as a machine, to the waters of the canal. It is a fresh-water fish, and when it gets into the sea or its waters, it is out of its element. In other words, what it does on rivers, bays, and creeks on the ebb and flow of the tide is, by the by, and merely temporarily incident to its main and essential object, which is to traverse the surface of the waters of the canal. It has no capacity for or adaptation to any of the purposes of a sea or river craft. It is a log upon the water, without the aid of extrinsic force. On the canal it depends on the power of horses

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moving on the land for its progress, and on the river on tugs for its headway. It is no more a ship, or craft, that falls within the jurisdiction of Admiralty, than a horse-cart or a steam-car that might be launched into a river and buoyed upon its waters; nor do the hands bear any of the merits or characteristics of the sailor, or of persons connected with shipping.

2. The act of Congress of 1845, by declaring that canal boats shall not be proceeded against in Admiralty, *in rem*, not only shows the legislative sense as to their want of nautical character, but also, by denying jurisdiction over the boat, has by necessary implication also taken away jurisdiction over the person for services in any such boat, as if the boat be not a sea craft in respect to which a libel could be filed *in rem*, jurisdiction of the person would, for the same reason, fail, for that cannot be a maritime contract in respect to a hulk which is not itself of Admiralty cognizance.

BETTS, J. It is unnecessary to consider the matters of defence set forth by the respondents in their answer, as an objection to the recovery is taken which is fatal to the libellant's claim, upon the case as made by himself.

The objection is, that the contract of hiring was one entire contract for the navigation of a boat from New York to Buffalo, and back from Buffalo to New York, each way through the Erie Canal; and that this Court cannot take jurisdiction over an agreement of this description.

The averment of two or three trips made between New York and Albany or Troy and back, and the proofs given of these particular services, do not aid the libellant, for they were all under the one employment, the boat failing to run out the whole extent of the voyage contracted, only when freight could be had but for a portion of it.

The Court has repeatedly held, upon the principles established in *The Thomas Jefferson*, (10 *Wheat.* 428,) *The Phœ-*

bus, (11 *Pet.* 175,) and in other analogous cases,¹ that this class of contracts are not suable in Admiralty. The main end contemplated was a service upon the canal, and the contract could not be severed, so as to give a remedy upon one portion of it in a maritime court, leaving the residue to be sued upon in a court of common law.

I do not now consider the question, whether the act of Congress of July 20, 1846, (9 *U. S. Stats.* 38, c. 60, § 1,) in relation to canal boats, which forbids jurisdiction *in rem* to any United States Court over canal boats, for the wages of any person or persons who may be employed on board thereof, or in navigating the same, affects also the jurisdiction of the courts against owners *in personam*, or against that class of vessels when employed on tide-waters; because, upon the allegations of the libel, and the proofs in the cause, I hold that the action cannot be maintained.

The transit of the boat from New York to Buffalo, and reversely from Buffalo to tide-water at Troy or New York, is not an employment of the boat in business of commerce and navigation between ports and places in different States or Territories upon the lakes and navigable waters connecting the said lakes, within the provisions of the act of Congress, approved February 26, 1845, (5 *U. S. Stats.* 726,) which extends the jurisdiction of this Court to cases of that character, so that an implication can be raised that this form of action may be sustained upon the instance side of the Court upon that description of contract.

Libel dismissed with costs.

¹ The principle determined in the cases cited, was, that the Admiralty Courts of the United States have no jurisdiction of a contract for services in a voyage substantially to be performed upon a river, and above the ebb and flow of the tide. Since the time when the decision in the text was made, the case of *The Thomas Jefferson* has been reversed, in *The Propeller Genesee Chief v. Fitzhugh*, (12 *How.* 443,) where it is held, that the Admiralty jurisdic-

Gaines v. Travis.

GAINES v. TRAVIS.

There is no rule of practice governing proceedings in Admiralty suits in the District Court which requires either party to give the other notice of a final decree, otherwise than by adopting the proper means for enforcing it.

A decree from which an appeal may be taken, cannot be executed within ten days after it has been rendered; but the delay is for no other purpose than to favor the right of appeal, and the mere entry of the decree is notice to all parties.

Under the rules promulgated by the Supreme Court, execution properly issues against stipulators, summarily upon the decree rendered against their principals; the giving the stipulation being regarded as a submission by the stipulator to such decree as may be rendered against the party for whom he is bound.

The act of Congress of August 23, 1842, (4 U. S. Stats. 518, § 6,) conferring upon the Supreme Court, power to regulate the practice of the Circuit and District Courts, taken in connection with the rules promulgated by the Supreme Court under that act, in 1845, operates as a suspension of the acts of Congress of 1839 and 1841, abolishing imprisonment for debt on process issuing out of the United States Courts in all cases where, by the local law, it would be abolished.

Since the adoption of the rules of 1845, parties are liable to arrest and imprisonment on process issuing out of the United States Courts, irrespective of subsequent legislation in the several States abolishing imprisonment on like process.

THIS was a libel *in personam*, filed by Levi Gaines against John H. Travis, to recover wages as seaman.

Former proceedings in the cause are reported, *ante*, 297.

The cause now came before the Court on a motion on behalf of the stipulator for the respondent, to set aside the proceedings subsequent to the final decree, and to discharge him from arrest.

S. Sanxay, for the motion.

Alanson Nash, opposed.

BETTS, J. This is a motion on behalf of McKee, the stipulator for the respondent in the cause, to set aside all proceedings

tion of the District Courts of the United States extends to the navigable lakes and rivers of the United States without regard to the ebb and flow of the tides of the ocean. The reasoning of this case does not apply, however, to canals, and the decision does not impair the authority of the case given above.

therein subsequent to the final decree, and also to discharge McKee from arrest on a *capias ad satisfaciendum* issued upon the decree.

It appears upon the papers and minutes of Court, read on the motion, that the cause was brought to hearing upon proofs given in Court, in September term last.

The matter in contestation was the liability of the respondent to pay to the proctor of the libellant the taxable costs which had accrued in the case.

Circumstances intervened after the argument which prevented the Court considering and deciding the cause until November term last, when a decree was rendered in favor of the libellant.

Early in December, his proctor served on the proctor of the respondent a copy of the bill of costs, with due notice of taxation.

The bill was returned by the respondent's proctor with a note, stating that he had not yet received notice of any decision in the case, and saying, "when I do, if it is against me, I shall, I think, most certainly appeal." This note was dated December 5th. The libellant's proctor proceeded notwithstanding, to tax his costs, and having perfected the decree, issued a writ of *capias ad satisfaciendum* thereon.

The decree entered was against the respondent, and McKee, his bail or stipulator, for the amount of taxed costs; and McKee was imprisoned upon the execution.

These proceedings, it is alleged, are without warrant of law, and irregular; first, because the decree was inoperative against the respondent until a copy with a notice of its rendition and entry was served on the proctor of the respondent; and, secondly, because the libellant took a final decree summarily at once against the bail or stipulator, without any process against him or warning of the proceeding, and followed decree so obtained by peremptory process of arrest.

It is further contended, that if the regularity of the practice

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is supported by the Court, the respondent and his surety are, by the laws of the United States, exempt from imprisonment upon the judgment, and that the bail is accordingly entitled to instant discharge therefrom.

The first objection is not tenable. This Court does not pursue the practice of the English Admiralty and Ecclesiastical Courts in awarding edicts or monitions to parties to appear in Court, and hear sentence or perform it, or admonish their fidejussors to do so. 2 *Browne's Civ. & Adm. L.* 356, 407, 429; *Clarke's Praxis*, 63, 65.

The multifarious proceedings connected with the progress of a cause through its different stages in those courts, are here dispensed with, and after issue, an Admiralty cause is put upon the calendar, brought to hearing, and disposed of substantially in the same manner as suits in the common-law courts. *Betts's Adm. Pr.* 98. The omission of the Supreme Court, in its code of rules adopted in 1845, to change the notorious course of the federal courts in this particular, strongly implies its sanction.

No rule of this Court, or of the Supreme Court, renders it necessary for either party to give the other notice of a final decree, otherwise than in employing the proper means for enforcing it, and no trace of such practice appears in any other of the United States Courts. *Dunlap's Adm. Pr.* 301; *Conkling's Adm. Pr.* 703.

If the case is appealable, the decree cannot be executed in this Court within ten days after it has been rendered, (*Dist. Ct. Rules*, 152); but it is not made incumbent upon the party obtaining the decree to warn the other when that period of delay will expire.

The entry *apud acta*, is notice to all parties. The delay or suspension of execution, is for no other purpose than to aid the party in exercising his right of appeal.

In case of surprise or misapprehension, the Court will always interfere on motion and due proofs, and enlarge the

time or stay execution until a reasonable opportunity is afforded to perfect an appeal. Except to that end, the practice in this Court extends no indulgence or privilege to the parties in the suit, to be notified or advised out of Court of proceedings in respect to the final decree.

The libellant is not, therefore, chargeable with any irregularity in omitting to serve a copy of the decree on the respondent or his proctor.

In the present case, it is admitted that the respondent's proctor was informed by the deputy clerk that the decree was rendered before he received the bill of costs with notice of taxation, which of itself was sufficient intimation to put him on inquiry.

The proceeding excepted to by the second objection, is comparatively a novel one in the practice of this Court, and therefore deserves more critical attention.

Under the standing rules and usages of the Court, it had formerly been necessary, in order to enforce the undertaking of stipulators, to proceed by independent orders and notices, after the lapse of ten days, to bring them before the Court, to show cause why execution should not issue against them. *Dist. Ct. Rules*, 145; *Betts's Adm. Pr.* 98.

The obligation of stipulators, as fixed by the rules of this Court, and also the remedy against them, have, since the promulgation of these rules, been essentially altered by the rules of the Supreme Court.

The bond or stipulation in this case was taken under the latter, (*Sup. Ct. Rules*, 3); and the condition prescribed by that rule is, that the respondent will appear in the suit, and abide by all orders of the Court interlocutory or final in the cause, and pay the money awarded by the final decree rendered in Court. And the rule provides that "upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties by the Court, to enforce the final decree." It appears this is a well-considered

direction of the Court, for the same language is repeated in Rule 4.

The practice in the Massachusetts courts had long antecedently been in conformity with that provision, (*Dunlap's Adm. Pr.* 301-3); and in this Court, since 1838, execution issued summarily against stipulators if the original decree was not satisfied, (*Dist. Ct. Rules*, 59); although the stipulators were charged by distinct proceedings. *Dist. Ct. Rules*, 145.

Under the Supreme Court rule, however, execution goes against stipulators, upon the decree against the principal; the sureties subjecting themselves by force of their undertaking to abide and fulfil the decree against the principal. *Conkling's Adm. Pr.* 459-774. This practice may fall within the usages familiar also to courts of law and equity, of requiring parties who have a common interest in questions litigated in the same court, in several distinct causes, either by agreements or stipulations between themselves, or by express order of the Court to abide the decision of the subject-matter made in one case only. Such judgment or decree thereby, has the same effect and is executed in like manner against all.

The stipulator under this rule binds himself to pay the money decreed against the principal. There is nothing, therefore, left open for him to question, as between the original parties, after a final decree fixing the liability of the principal. If admonished or cited by *sci. fa.*, he could not be permitted to set up error of any kind in the decree, or surrender the principal, or invoke prior execution upon his property, and all the advantage of such after-proceeding would be to afford delay to him in satisfying the terms of the decree.

The Court, however, accepts his undertaking as placing him in a common predicament with his principal, and as a submission of himself to the same processes upon the decree. *Conkling's Adm. Pr.* 774.

The execution taken out in this case was, therefore, authorized by Rule 4, and is in conformity with Rule 21; and the

objection to this method of proceeding cannot, therefore, be supported.¹

The term *summary*, when used in relation to process, means immediate, instantaneous. This in no way interferes with the authority of the Court over it, whilst in progress of execution, but it is issued summarily in contradistinction from the ordinary course by emanating and taking effect, without intermediate applications or delays.

The last point discussed in the case relates to the effect of the non-imprisonment acts of Congress and of this State, and whether a stipulator can now be made subject to arrest and imprisonment on execution upon a decree in the Admiralty, for breach of a contract.

A preliminary question was raised as to the regularity of the process issued, it being a *fi. fa.* against the property, with direction to arrest the person in case no property was found to satisfy the decree.

This objection is not tenable. Under Rule 3 of the Supreme Court, the stipulator becomes subject to the same decree and process with his principal, and this form of execution is authorized by Supreme Court Rule 21.

The two acts of Congress abolishing imprisonment for debt on process issuing out of the courts of the United States, were passed February 28, 1839, and May 14, 1841. 4 *U. S. Stats.* 321, 410.

The second act is supplementary to and declaratory of the first, and directs it to "be so construed as to abolish imprisonment for debt on process issuing out of any court of the United States, in all cases whatever, where, *by the laws of the State in which said court shall be held, imprisonment for debt has been or shall hereafter be abolished.*" The act of 1839, in

¹ See also, on this point, *Holmes v. Dodge*, ante 60.

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terms applied only to the laws of the States existing at the time of its enactment.

The Revised Statutes of New York, in force when both acts of Congress passed, direct that no person shall be arrested or imprisoned on any civil process issuing out of *any court of law*, or any execution issuing out of *any court of equity*, in any suit or proceeding instituted, for the recovery of any money due upon any judgment or decree, founded upon contract, or due upon any contract, express or implied, or for the recovery of any damages from the non-performance of any contract. 1 *Rev. Stats.* 807, § 1.

Regarding the State statute as thus incorporated into the act of Congress, it would manifest the intention of the legislature to limit its application to arrests and imprisonments made on civil process issuing out of courts of law, and *executions* only issuing out of courts of equity.

This Court cannot enlarge the repealing force of the statute beyond the plain meaning of its language, nor suppose the legislature looked beyond the two descriptions of process specifically designated.

The distinction between courts of law, equity, and admiralty, is pointedly marked in the constitution and laws of the United States. *Const.* art. 3; *Process Acts* of 1789, 1792, and 1828; 1 *U. S. Stats.* 93, 276. It is directed, that the forms of writs, executions, and other process, and the forms and modes of proceeding in suits in those of common law, shall be the same in each State, as used or allowed in the Supreme Court thereof, in those of equity, and in those of admiralty and maritime jurisdiction according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law. *Act of May 8, 1792*; 1 *U. S. Stats.* 276, § 2. The act of May 19, 1828, is to the same effect in respect to States admitted into the Union since 1789, (4 *U. S. Stats.* 278); and section 3 of the latter act, which directs

executions and final process issued on judgments and *decrees* rendered in any of the courts of the United States to conform to those of the State, plainly limits the decrees to those made by courts of equity. *Manro v. Almeida*, 10 *Wheat.* 473; *Hind v. Vettis*, 5 *Pet.* 298. Power is given the courts by these acts, to vary their processes at discretion, and so as to render them operative entirely beyond like process issued by State courts, (*The United States v. Halstead*, 10 *Wheat.* 51,) unless Congress has regulated the subject by specific enactments. *Duncan v. The United States*, 7 *Pet.* 435.

It is manifest upon this succinct summary of the acts of Congress and decisions of the United States Courts, that the State statute referred to has no application to arrests and imprisonments under process from Courts of Admiralty. Their practice remains as it was declared by the acts of 1789 and 1792, and as altered by the courts under the authorization of those acts and that of 1842, to be adverted to hereafter. *Gardner v. Isaacson*,¹ (*MSS.*) 1848.

On April 12, 1848, the legislature of New York passed an act "*to simplify and abridge the practice, pleadings, and proceedings of the courts of this State.*" By section 153 of that act, it is declared, that "No person shall be arrested in a civil action except as prescribed by this act," and then specifies the cases in which a defendant may be arrested; none of which include suits or contracts without fraud or deceit.

A libel and warrant of arrest, *in personam* in Admiralty, is a *civil action* within the proper classification of remedies; and this interdiction of arrest, in connection with the act of 1841, would give to defendants in Admiralty the same exemption from arrest as defendants have under processes from the courts of law and equity.

There is no doubt that Congress may, by clear enactment,

¹ Reported *ante*, 141.

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adopt the prospective legislation of the States, and impart to it the effect of an act of the national government. The United States v. Paul, 10 *Pet.* 150. Upon the same principles, Congress can confer on the United States Courts power to regulate process in conformity to existing State laws, or direct it to be conformed to *future* legislation of the State upon the subject. Ross v. Duval, 13 *Pet.* 45.

All regulations relating to processes of courts are regulations of *practice*. 10 *Wheat.* 1. In this, the United States jurisprudence is wholly distinct and independent of that of the States, and accordingly the local methods of proceeding govern the United States Courts only in so far as they are sanctioned by authority of Congress or the courts. This authority is expressed as well by rules which the courts are empowered to prescribe, as specifically by statutory enactment.

The acts of Congress to abolish imprisonment for debt, assume to act only over process, and are merely provisions regulating the practice of the United States Courts. They are not placed upon high principles of humanity or public policy. They profess no more than a purpose to conform to the processes employed by the States where the courts exercise jurisdiction, forbidding the imprisonment of debtors when not allowed by the laws of one State, and permitting it wherever authorized by the laws of others.

Accordingly, if the legislature of New York at its present session, should rescind the code of practice promulgated by the last, this provision, which is supposed to stand in connection with the act of Congress of May 14, 1841, would *eo instanti* cease to have influence over the proceedings of the United States Courts.

It becomes necessary, therefore, to examine the act of Congress of 1842, to ascertain whether this matter is not now withdrawn from the regulation of the State legislature, and specifically provided for by Congress.

The act of August 3, 1842, (4 *U. S. Stats.* 518, § 6,) confers upon the Supreme Court "full power and authority to prescribe and regulate and alter the forms of writs and other process to be used and issued in the District and Circuit Courts of the United States, and generally to regulate the whole practice of said courts."

In January Term, 1845, the Supreme Court adopted a body of rules governing the United States Courts in Admiralty proceedings, and the portions of those rules before cited fully appoint the form of process used in this case.

The question then is, does the existing law of New York, in connection with the act of Congress of May 14, 1841, prevent the operation of the act of August 23, 1842, and the rules of the Supreme Court established under its provisions?

The act of Congress of May 14, 1841, at the time of its passage, took effect the same as if it had incorporated the State enactment of 1848. It thus interdicted the arrest and imprisonment of parties prosecuted in matters of contract and debt in this Court, suits in Admiralty being *civil actions*.

Upon the same principle, the rules of the Supreme Court of 1845, are to be regarded as acquiring the force and effect of a positive enactment. Congress can legislate prospectively through the action of the Supreme Court as well as that of a State legislature. Manifestly then, the act of 1842, carried out by embodying the rules of the Supreme Court of 1845, repeals or suspends so much of the act of 1841, and its complement of State laws, as stand in contradiction to it. The latter law regulates the form and effect of Admiralty process, and reinstates the power of arrest and imprisonment under it for debt. The law of New York, passed subsequent to the act of 1842, cannot supplant or suspend the provisions and effect of the latter, and restore those of the act of 1841, Congress having, by the act of 1842, substituted the Supreme Court in place of State legislatures as the law-making power in the future regulation of the processes and practice of the courts, the action of the Court

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under that power necessarily annuls all antecedent and subsequent control of the Staté laws over the subject. So long as the Supreme Court Rules remain unchanged by the Court or Congress, they must supply the absolute law of practice over the subject.

I do not enter into the discussion whether, upon this construction of the act of 1842, the Supreme Court may not also extend to courts of law and equity, the same power to arrest and imprison on process, that is given in Admiralty cases. The point is not before me for adjudication; and although that is a legitimate and forcible consideration on weighing the probable meaning and intent of Congress in the entire provision, it is not in my judgment of such force as to justify me in holding that the Supreme Court had misinterpreted their powers under the statute in relation to Admiralty practice, or that the act of 1841 should be expounded to draw within its provisions cases clearly not covered by it at its enactment, and brought into existence by State legislation subsequent to the act of 1842, and the rules of the Supreme Court established under its authority.

The known usage in the Admiralty Courts, up to the present time, to arrest for debt and hold to bail, or imprison for want of it, upon their processes, notwithstanding the acts of Congress of 1839 and 1841, and the laws of State legislatures abolishing arrests and imprisonment for debt, is impressive evidence that Congress acquiesced in the judgments of the courts, that those laws did not govern the practice in Admiralty; more especially since the promulgation of the Admiralty Rules, in 1845, by the Supreme Court, in which the authority to arrest and imprison on Admiralty process, was explicitly recognized and declared. And the practice having since been constant and open to arrest and imprison parties on mesne and final process, from the Admiralty, it must be accepted that Congress intended by the act of 1842, to place the regulation of this branch of practice un-

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der the direction of the Supreme Court, and not leave it subject to the changeable legislation of the States.

I accordingly pronounce against the motion on all the points raised, but they being of novelty and importance, the decision is without costs.

HENRY v. CURRY.

In defence to a libel for wages as cook and steward by one William *Henry*, respondent put in shipping articles executed by William *Henderson* as cook and steward. *Held*, that the presumption was that the libellant was the person who had entered into the articles.

Maritime courts will not lay much stress on an objection of misnomer, unsupported by evidence that the party was in fact not known by the name ascribed to him.

It seems, that where original shipping articles are proved before a commissioner, and redelivered to the vessel, who thereupon pursues her voyage, a copy certified by the commissioner is competent evidence upon the hearing.

THIS was a libel *in personam* by William Henry against Frederick Curry, sued as Johnson, master of the bark *Alpine*, for wages.

Alanson Nash, for the libellant.

Griffin & Laroque, for the respondent.

BETTS, J. The libellant alleges that he shipped on October 24, 1848, in the bark *Alpine*, as cook and steward, at \$16 wages per month, to perform a voyage from Halifax, Nova Scotia, to Sydney and New York, where the voyage was to terminate; and that he performed his duty on board up to November 12th, when the vessel arrived at this port and the voyage ended. He claims \$9 balance of wages due him.

The answer asserts that the bark is a British vessel, and the libellant a British seaman; and that the voyage for which he engaged was from Halifax to various ports including New

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York, and to Europe, and back to British North America, for a period not exceeding one year.

The original articles were produced on the preliminary hearing before the commissioner, and identified by the testimony of the chief mate. William *Henderson* is entered therein as cook and steward. The name is signed with a cross or mark. The handwriting of the witness to the execution of the articles by Henderson is proved, and that he resides in Nova Scotia. This action is in the name of William *Henry*.

The sufficiency of this evidence is controverted by the libellant, on the ground that, as he is not proved to have been known on board by the name of Henderson, the presumption is that he came out as a substitute for Henderson, but never bound himself to the engagement of Henderson by subscribing to the articles. The objection is also extended to the further suggestion, that even if proof of the handwriting of subscribing witness is ever adequate evidence of the execution of articles, it can be so only on the exhibit of the original articles to the Court, in order to show that the whole transaction wears the appearance of genuineness and correctness.

The libellant having brought suit for wages in the capacity of cook and steward, and having adopted the name of William *Henry*, it is incumbent on him to prove that to be his true name; otherwise the inference will be, that he is the person who shipped and subscribed the articles in that capacity. The difference in surnames is not so great, but that a misconception in pronunciation might easily occur; and maritime courts are too familiar with the habit of sailors to assume a variety of names, to lay special stress on an objection of misnomer, unaccompanied with evidence on the part of the seaman that he did not use the name attached to the articles, and that he was known in the ship by a different one. No evidence is offered by the libellant that he is William *Henry* and not William *Henderson*; and since he assumes to him-

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self the description of cook and steward, applied in the articles to William Henderson, it must be presumed by the Court that he is the person who entered into the contract. It is moreover to be observed, that the libellant is not very exact in his recollection and statement of names. He sues the master by the name of *Johnson*, but gives no evidence that anybody on board did not perfectly well know that his name was *Curry*. It so appeared upon the articles, and was proved to be his true name by the testimony of the chief mate.

The original articles, after having been examined and proved in presence of a commissioner, upon the hearing on return of the summons, were restored to the vessel, and had gone with her on her voyage. A copy certified by the commissioner is attached to the depositions. For the libellant, it is objected that such copy is incompetent evidence. The cause not depending upon the evidence furnished by the articles, I do not think it necessary to go into the discussion of that point; but my impression is, that the evidence should be regarded competent and sufficient, the authentication of the articles having been made in a judicial proceeding in the cause under the act of Congress of July 20, 1790, before a magistrate authorized to conduct it.

The chief mate testifies that the voyage was not to end at New York, but was to be continued from here to Ireland, and back to Halifax, and that the libellant shipped for the voyage. No evidence is furnished by the libellant showing the termination of the voyage at this port, or his discharge by the master. Upon the well-settled doctrine of Admiralty Courts, he therefore cannot sustain this action, irrespective of the nationality of the vessel.

But suing as a British seaman, for services on board a British vessel, his claim to relief in this Court is wholly destitute of merits.

Libel dismissed with costs.

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There is no statute in force regulating the compensation payable for pilotage service rendered through Sandy Hook channel.

The former laws upon this subject reviewed.

Doubtful words in a general statute may be expounded with reference to a general usage; and when a statute is applicable to a particular place only, such words may be construed by usage at that place.

The libellants piloted a vessel partially crippled, but not in immediate peril, nor unnavigable, through the Sandy Hook channel, and claimed extra fees, as for a vessel in distress, on the ground of usage of the port.

Held,—1. That the proofs in the cause did not authorize the Court to say, that the term *distress* was by the usage of the port applicable to the condition of the vessel in question.

2. That the proofs did not show a usage of charging and paying double fees as a legal right, even for services rendered to a vessel in distress.

3. That the libellants were entitled to a reasonable extra compensation to be fixed by the Court, for the increased responsibility and effort presumably incurred in consequence of the crippled condition of the vessel.

THIS was a libel *in personam*, by William Love and others, against William A. Hinckley, to recover pilotage fees, including compensation for alleged extra services, in the sum of \$83. The facts are sufficiently stated in the opinion of the Court.

P. Hamilton, for the libellants, cited *The Frederic*, 1 *W. Rob.* 16; *The Elizabeth*, 8 *Jur.* 365; *The Enterprise*, 2 *Hagg. Adm. R.* 176, note; *The Reward*, 1 *W. Rob.* 174; *The Elvira*, *Gilp.* 68; *Abbott on Shipp.* 563.

R. H. Ogden and *G. Bowdoin*, for the respondent.

BETTS, J. The libellants are owners of the pilot boat *Mist*, of this port, and are pilots engaged in the pilot service through Sandy Hook. About October 12, 1848, one of the libellants, William Love, entered on board the bark *Gipsey*, at sea, six miles outside of Sandy Hook, and at the request of the master, piloted her into this port. The bark at the time

had lost her three upper masts. The wind was easterly and fair, and the bark was brought into port upon it, without difficulty or extra exertion on the part of the pilot.

So far the facts are agreed upon by the pleadings. The libel charges, however, that the bark had suffered other damages, and that she was in a crippled and disabled condition, and in distress. These allegations are denied by the answer.

The libellants claim double the accustomed pilotage, amounting to \$83, because of the crippled condition of the bark, rendering it more hazardous to navigate her, and subjecting the pilot to greater exposure and responsibility.

The answer insists that the service was no more than ordinary, that it was performed within five or six hours, without extra exertion or skill on the part of the pilot, and that he is only entitled to \$41.50, the usual pilotage fees for bringing up a vessel of like draught.

There is no statute in force which determines the rights of parties in cases like the present. The act of Congress of 1789, (1 *U. S. Stats.* 54, § 4,) provides, that all pilots "shall continue to be regulated in conformity with the existing laws of the States respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provisions shall be made by Congress." No further legislative provision has since been made, and the whole subject of pilot service remains a matter controlled by State laws.

Under the colonial government, the business of pilotage through the channel of Sandy Hook was the subject of careful statutory regulation. Those regulations may be found in the act of 1759, (2 *Livingston & Smith's Laws*, 160, c. 161,) which act was continued in force by the act of 1763, (*Van Schaick's Laws*, 433, c. 1215, § 2,) and by the acts of 1767, (*Ib.* 498, c. 1330,) and 1768, (*Ib.* 516, c. 1362,) until 1775. This act awarded no extra compensation for services rendered to a vessel in distress; but provided that any pilot neglecting

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or refusing to give all the aid and assistance in his power to any vessel in distress should forfeit his office and pay a fine. Act of 1789, 2 *Livingston & Smith's Laws*, 160, c. 161, § 4.

An early act of the State government, passed in 1801, (2 *Kent & Radcliff's Laws*, 133, § 18,) and which provided for the appointment of pilots for the Sandy Hook channel, by the harbor-master and wardens of the port, contains the earliest provision I find upon the subject of extra compensation in cases of distress, in the laws of the State. That provision is in substance, that the master or owners of the vessel in distress shall pay to such pilot as shall have exerted himself for the preservation of such ship or vessel, such sum for extra services as may be agreed upon; or in default of any agreement, such sum as the harbor-master and wardens shall determine to be reasonable. § 18. The act of 1837, (*Laws of 1837*, 168,) which repealed all former laws on the subject of pilots through the Sandy Hook, prescribed a new system, intrusting the power of appointment of pilots to a board of commissioners created by the act. This statute contained, also, new provisions upon the subject of compensation, (§§ 30-36,) enacting, among other things, however, that every pilot who shall have exerted himself for the preservation of any vessel in distress and in want of a pilot, should be entitled for any extraordinary services to such sum as should be agreed upon; or in case of not agreeing, as the commissioners should determine to be reasonable. § 39. It is unnecessary, however, to trace the history of the legislation upon this subject minutely, as by act of 1845, (*Laws of 1845*, 30, c. 40, § 1,) all laws relative to pilots, or pilots through Sandy Hook channel, are repealed; and no law upon the subject has since been enacted.

It seems, however, to be conceded upon both sides, that the usage at this port has continued to be to charge fees for pilotage in conformity with the rates established by the act of 1837, since its repeal; and that \$41.50 would have been

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the legal charge under that act, and would be the charge as since established by usage, for single pilotage.

Upon the part of the libellants, evidence has been given showing a custom and usage, whilst the statute was in force and since, to charge double pilotage on vessels crippled and disabled. Some of the witnesses stated the custom to be, to charge the extra compensation when the vessel was in distress. There was some contrariety of opinion whether the damage which the bark *Gipse*y had received was to be regarded as putting her in distress; but the majority of the witnesses gave it as their judgment that she was in distress in the nautical acceptation of the term, and stated that the usage was to pay double pilotage for services rendered to a vessel conditioned as she was. Of the five pilots called by the libellants, and who testify to the usage, two had been in the commission but a short period; one for five years and the other since 1842; one other had been in service since 1834; another about thirty years. The time of service of the fifth was not stated. A member of the board of commissioners, and who for twelve years had great experience as a ship-master and ship-owner, testified that he never knew any usage putting vessels nearly crippled on the footing of vessels in distress, and that a vessel situated as this one was, would not, as he understood the acceptation of the term among owners and masters, be deemed in distress.

All this testimony is open to two remarks. First, the period elapsed since the repeal of the law in 1845 is not sufficient to create a custom or usage in respect to this matter which shall be obligatory upon ship-owners and masters. Indeed, it is not proved that an individual case, analogous to the present in its circumstances, has occurred in this port since the passage of the repealing act. A usage in respect to mercantile transactions must be shown to be notorious, uniform, and of long continuance. 2 *Kent's Comm.* 6th ed. 260 and note.

But second, this usage to have any effect must be allowed

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to control or fix the interpretation of the State statutes; because the practice referred to, if not derived from, must seek its support or sanction in the provisions of section 39 of the act of 1837. There is no evidence that it preceded the enactment. A general statute may be expounded when its words are doubtful, by reference to any general usage with reference to which the law may be supposed to have been enacted. "Where the words of the act are doubtful," says Grose, J., in *The King v. Hogg*, (11 *Durnf. & E.* 728,) "usage may be called in to explain them." In that case, which involved the construction of an act of Parliament applicable to the whole kingdom, it was very properly held that, as a universal law could not receive different constructions in different towns, therefore a statute of general application could not be explained by the usage of this or that particular place. And the cases of *The King v. Saltrem* and *The King v. Harman* were cited from the early reports, as showing that it is only by a universal usage, and not by the usage of a particular place, that an act of general application could be expounded. But I should think it entirely consistent with this principle to hold, that a statute may be construed by the usage of a particular place or pursuit, when the act has relation to that place or special business.

It is not shown in this case that there is a fixed and definite sense attached by established usage at this port to the term *distress*, which would include a vessel partially crippled and disabled, but in no immediate peril, and not rendered unnavigable. The witnesses examined on the stand do not concur entirely in their description of the custom or usage which they suppose prevails here. It may be considered as doubtful upon the proofs, whether it has not been the usual course for the pilot in boarding a vessel of this port, in any way crippled or disabled, to state to her master that he should claim double pilotage for her as being in distress. In that case it might be in the option of the master to accept him or

not, and if he were allowed to pilot her in, it might be understood to be by agreement for that rate of compensation, and thus bring the case within the provisions of section 39 of the State act, whilst that was in force, and applying to the customary rate of fees since its repeal.

So, had a long uninterrupted practice been shown under the State laws, to charge pilotage for every crippled vessel as for a vessel in distress, such practice would be good evidence of the true meaning of the act. *McKeen v. Delaney*, 5 *Cranch*, R. 22. But the testimony of the two witnesses who speak most directly in proof of a long practice, does not show that the rate was uniformly charged and paid as a legal right. The one who speaks of thirty years' experience says, that he uniformly mentioned, on boarding the vessel, that he should claim extra pilotage; and it is to be remarked that the State acts always embodied provisions for adjusting pilotage fees when not agreed upon between the master and pilot, by the award of commissioners, by the board of wardens, or other functionaries designated in the various statutes. See the acts already referred to; also 5 *Webster & Skinner's Laws*, 11.

It certainly cannot be maintained that the testimony in the case amounts to proof of a long-continued and uninterrupted practice pursued at this port, to charge double pilotage as a legal demand in such cases as the present.

The evidence, fairly weighed, amounts to no more than this, that pilots were accustomed to claim double pilotage when they brought in vessels crippled or disabled, and that it was usually paid. By adverting to the provisions of section 39, it will be perceived, however, that the demand and payment would not necessarily import a concession that the statute gave the pilot a right to the fees; nor would it even imply that the demand was rested upon the statutory grant. Such practice, therefore, although of ever so long duration, would not furnish evidence of a customary construction of the clause upholding a right in pilots to such fees.

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The section is in these words : " Every pilot who shall have *exerted* himself for the preservation of any vessel in *distress* and in want of a pilot, shall be entitled for any *extraordinary services* to such sum as the pilot and master, owner or consignee can *agree* on ; or in case of not agreeing, as the commissioners shall determine to be a reasonable reward."

It is plain that to make out a title to extra reward under his enactment, not only must the pilot have exerted himself for the preservation of a vessel in distress, but also that he can only claim a compensation limited to a proper reward for his extraordinary services on the occasion. The vessel in the present case was brought into port without any uncommon efforts on the part of the pilot. Even if, therefore, she had been indubitably in a state of distress, the statute would afford no ground for a claim to extra pilotage ; no extraordinary services having been rendered. No practice under the statute could be admitted as dispensing with the two fundamental conditions to the grant of fees ; for this would be something quite different from interpretation ; it would be allowing usage under a statute to override and annul its positive provisions. No mode of construction, not even the most solemn judicial decisions, can rightfully dispense with the plain and positive terms of a statute ; and the reasonable presumption in respect to the supposed usage and custom of this port is, that it was not derived from the directions of the statute, but from its permission given to the parties to stipulate between themselves the rate of compensation, under which an express or virtual agreement between the master and pilot generally fixed the extra reward. In my opinion, no usage independent of statutory authority is proved, authorizing a charge of double pilotage in a case like the present, nor any practice under the statute giving it an interpretation which would include this demand.

There being no rate fixed by statute, of fees payable to pilots in this port, the libellants are entitled to be paid a rea-

sonable reward for the services performed by them. The answer admits that the accustomed compensation, \$41.50, for ordinary pilotage, would be a proper allowance in this case; and the consignees express a readiness to pay that sum. All the witnesses for the libellants testify, that some degree of extra care and exertion would be required in bringing in a vessel so situated, in the most favorable weather, as well as some increase of the responsibility of the pilot. For such extra liabilities he is entitled to a reasonable compensation. What amount is appropriate and proper, in such cases, it will always be difficult for the Court to ascertain and determine, either by general rules or by any course of specific inquiry and adjudication, in a way likely to establish a criterion acceptable to those interested, or satisfactory to the Court itself. The statute made provision for adding four dollars to the usual pilotage fees, on vessels drawing more than ten feet of water, for services rendered between the first of November and the first of April; (§ 36,) on the presumption undoubtedly that more exertion and hazard would be incurred on the part of the pilot, in the case of such vessels, during that season. So also an addition of one quarter to the usual pilotage was allowed, where the vessel was taken charge of out of sight of Sandy Hook light-house. § 31. These enactments were devised with a view of adapting the compensation to the degree of risk and skill which might be demanded from the pilot; and for the want of any other acceptable guide, they may perhaps be properly referred to, as indicating the extra reward meet to be allowed for services which import a degree of care and watchfulness beyond that required in ordinary pilotage. It may be noticed, that while the addition of one fourth pilotage was awarded in a class of cases in which an extra service was of necessity rendered, the extra allowance of four dollars was based only upon a presumption, that in the special instances to which it was applied, an unusual exertion, care, or hazard would generally be incurred; and the extra sum

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was to be uniformly paid, although in the particular case the actual service might not have been increased. As I consider this to be a case for extra reward, only because of greater presumptive risk and exposure to the pilot in managing a crippled vessel, I shall, as a reasonable measure of the *quantum meruit*, apply to it the rule of increase prescribed by the statute for the class of cases, where, from general facts, a particular enhanced risk was to be presumed, and shall direct that there be added to the accustomed fee of \$41.50, the sum of four dollars extra, the former statutory allowance for piloting the larger class of vessels between the first of November and the first of April. The compensation awarded to the libellants is accordingly fixed at \$45.50.

The circumstances of the case, however, do not entitle the libellants to plenary costs. The respondents show fair ground for contesting the demand, and the libellants, not showing themselves entitled to more than \$50, ought not to recover above summary costs.

Decree accordingly.

WICKS v. ELLIS.

A motion to discharge respondent from arrest, on the ground that the libellant has no legal cause of action against him, will not be granted where the affidavits read upon the motion in behalf of the respective parties, are contradictory as to the merits of the cause.

In an action by a minor to recover wages as seaman, the respondent is not entitled to require the appointment of a guardian *ad litem* or next friend for the libellant.

THIS was a libel *in personam*, by Daniel Wicks against John Ellis, to recover seamen's wages.

The respondent now moved, upon affidavits, that he might be discharged from arrest, on the ground that the libellant had no legal cause of action against him; or that, if the suit were

not dismissed, a guardian might be appointed for the libellant, and he be required to file security for costs, on the ground that he was not twenty-one years of age.

BETTS, J. The first branch of the present motion cannot be granted, because it turns upon the merits of the cause, in respect to which the parties stand in direct contradiction as to the facts. The controversy between them cannot be disposed of summarily by the Court upon *ex parte* affidavits. It must be determined upon proofs and upon a regular hearing.

The nonage of the libellant does not entitle the respondent, as of right, to the relief asked by the second branch of his motion. He must, at least, show that he may lose some advantage of defence or recovery (as of costs,) if the case is allowed to proceed to contestation in the name of the libellant alone. Admiralty Courts allow a minor to recover in his own name wages earned in sea-service when the contract on which he sues was made personally with him, and it does not appear that he has any parent or guardian or master entitled to receive his earnings. In this case the libellant swears that he always makes his own contracts of hiring, and that he receives to himself the wages earned, and that there is no other person entitled to receive them. The respondent gives no evidence disproving these allegations; and it appears that the libellant is nineteen or twenty years old, accustomed to transact business for himself, and that he is not, therefore, to be presumed to require, from imbecility of age, the protection of a next friend or guardian to manage his suit.

The libellant is also a privileged suitor, not under obligation to file a stipulation for costs; nor could his *prochein ami* be required to do so. *Dist. Ct. Rules*, 45; and *Add. Rule*, April, 1847. There is, under these circumstances, no equitable ground laid for the interposition of the Court to prevent

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the libellant from proceeding in his own behalf; and if the objection is foundation for legal defence to the action, the respondent must be put to his plea to the competency of the libellant. When, however, the action is for other causes than the recovery of wages, and security for costs must be given, Admiralty Courts conform to the course of practice prevailing in other courts in respect to parties disqualified from suing in their own rights. *Betts's Adm. Pr.* 18.

The motion is denied; but without costs as against the respondent.

Order accordingly.

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The employment of a master to take command of a vessel for a foreign voyage, is usually a circumstance so notorious that there can seldom be wanting definite and decisive evidence by which the fact of such employment may be established. There is, moreover, no incompatibility between the employment of one person as master to superintend the loading and preparing a vessel for sea, and the engagement of another person to take the command of her upon the voyage. When, therefore, one claiming under an alleged employment as master for a foreign voyage seeks to establish such employment, merely by inference from services rendered and acts performed by him, under authority of the owners, in making the vessel ready for sea, the Court will require that the evidence shall be so strong as to exclude all reasonable doubt that an employment for the voyage was intended.

THIS was a libel *in personam* by Frederick W. Jones against Samuel G. Davis and Cornelius Savage, owners of the brig *Fawn*, to recover damages for the wrongful discharge of libellant from an alleged employment as master.

BETTS, J. The libel avers that the respondents hired and engaged the libellant to take charge of the brig *Fawn*, owned by them, as master thereof, at the wages of a dollar a day for the time she should remain out of employment, and at the

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wages of sixty-six dollars per month from and after the time of her obtaining employment. That, in pursuance of the agreement, the libellant entered on board the brig July 17, 1848, and continued on board, in command of her, until August 2d, following, when a charter was obtained for her to St. Petersburg, and other places. That thereupon, on August 3d, he commenced loading the *Fawn* for the voyage, which was to be circuitous and of uncertain duration, and continued that service until the brig was loaded and fully ready for sea; when on August 14th, the respondents wrongfully and without previous notice, discharged him, and would not permit him to make the voyage, upon the allegation that they had disposed of part of their interest in the vessel. The libellant avers, that by such wrongful discharge, he has sustained damages to the amount of \$800, being wages, expenses and board for the probable duration of the voyage. He prays the Court to pronounce for the damages aforesaid.

The answer explicitly denies any agreement with the libellant, hiring him as master of the brig, for any time or upon any terms; and also denies that the respondents were partners, or that the brig was chartered for the voyage described, or that they gave libellant any encouragement to incur expenses of preparation to act on board of her as master for the alleged voyage. It sets forth, in detail, what the respondents assert to have been the agreement made between them and libellant; but it is not necessary to advert to that portion of the defence, as the libellant seeks no decree for services on board as ship-keeper, but sues wholly in the character of master, hired to serve as such over the vessel, both in port, while seeking freight, and afterwards at sea, and for *damages* for loss of wages, &c. during the probable duration of the voyage for which the vessel was engaged. The answer, moreover, admits that on August 14th, during the lading of the brig, they agreed with one Shaw that he should go in her as master, and states that libellant was then informed in substance that

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a master was engaged for the voyage, and that his further services would not be required.

No express hiring of the libellant, as charged in the libel, is proved, nor is it shown that he was put in possession of the vessel in the character of master. The argument in his behalf is, that the agreement set up is to be implied from the facts in evidence. The facts relied upon to raise this implication are, that the libellant was on board the vessel for some time in July and August,—that one of the respondents said to the notary who was employed to ship a crew for the voyage, that Captain Jones would superintend the selection of the men,—that the shipping articles were drawn up, and the crew hired by the notary, in the expectation that the libellant was to command the vessel,—that the libellant gave orders and made arrangements on board for the voyage, in taking in cargo, supplies, &c.,—that upon one occasion the libellant, at the express direction of one of the respondents, signed bills of lading for part of the cargo,—and that he was also conversed with by one of the respondents, in relation to the course he would pursue in case the vessel should be detained by ice in the Baltic.

The respondents proved a conversation had since the cause was at issue, between a witness and the libellant, in which the latter stated to the witness, that the ship-keeper of the brig having left her, he, the libellant, agreed with the owners to go on board her and sleep at night, and to look for business during the day; and that respondents were to give him a dollar a day for the service. They further proved that the libellant did not sign the shipping articles, or ship the first or the second mate for the voyage,—that a provisional agreement was made by him, with the assent of the owners, with one Coffin, to go on board and assist in loading the vessel at a dollar and a half a day, with the understanding that if he was approved he should be employed for the voyage as first mate; another person was, however, shipped in that capacity,—

that when the brig was ready for sea, and hauled out into the river, the libellant left her, and Captain Shaw having then become a part-owner, cleared her as master, and came on board, and made the voyage in command of her.

Evidence was given on the part of the libellant of his general repute for skill and fidelity, and of his ample experience as shipmaster. The respondents on their part proved, that they made inquiries of persons who had employed him, and that they obtained unfavorable accounts of his qualifications.

The facts and circumstances in evidence, are clearly consistent with the claims set up by the libellant, that after August 3d, he was employed by the respondents as master of the brig for the voyage, but they are by no means of force sufficient to exclude the presumption that he was continuing with the vessel on his original undertaking, with a hope and expectation of receiving the command of the brig when she should be sent upon a voyage. Indeed, it must be conceded that the facts tend about equally to the support of either hypothesis.

The circumstance which most directly sustains the claim of the libellant is his act of signing bills of lading in presence of one of the owners, during the time the brig was loading. This being one of the functions of a master, very strongly imports that libellant was at that time clothed with a master's authority. It must be remarked, however, that the appointment and employment of masters is wholly at the discretion of owners, (*Abbott on Shipp.* 156 ; 3 *Kent*, 161,) and, that there is no incompatibility in assigning a person to that agency in a home port, for the purpose of loading and fitting out a vessel, although he is not to act as master for the voyage. Advantages may result to owners and to commerce from placing this home service in the hands of men of experience and dispatch in the business of inspecting, taking in and storing cargo, or selecting the men, who no longer go abroad as navigators, or may not possess proper qualifications

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for that duty. Such employment of a master in port might also be desirable for the purpose of satisfying owners of his competency to take charge of the ship or manage her business upon her voyage. The owner and ship would stand charged by his acts as master *pro hac vice*, without respect to the fact of actual command at sea. A transaction which occurred in loading this vessel illustrates this principle. It appears that Coffin applied for the office of first mate, which was vacant, and he was recommended by the libellant as a proper person to fill it. He was taken into service to assist in loading the vessel, with a view to his engagement as first mate, if he should be approved of. The fact of his being on the vessel, and acting in port as her first mate, does not accordingly determine that he was shipped for the voyage in that capacity. The auxiliary fact of his having signed the shipping articles would certainly be required, in absence of oral proof of express hiring.

It seems to me that this principle should be applied to the engagement of a master, and that it governs the present case. There would appear to be rarely any occasion to resort to implications and presumptions for the purpose of showing employment in that important capacity. The fact must almost invariably be too notorious and marked, to leave any room for question. The owners treat with masters publicly as such. The vessel is advertised for her voyage in his name. Bills are furnished to him, and certified by him in that capacity, and scarcely any particular can be referred to in the employment of a vessel, less likely to be wanting in means of clear and decisive proof, than the appointment of master for a foreign voyage.

When, therefore, a resort is had to circumstantial evidence to establish the employment of a master, the evidence required should be of a character which leaves no fair reason to doubt the fact; and must certainly go further than to present a case equally consistent with the supposition of a temporary en-

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gagement in port in preparation for the voyage, as with an appointment to go out in command of the vessel. I forbear expressing any opinion upon other topics of importance involved in the case, the right of a master to consequential damages, because of a breach of a contract of hiring of this kind with him, or the legal measure of such damages, or the limitation, if any, of the power of an owner to displace a master from his command, or to refuse entrusting a vessel to him.

There being no satisfactory evidence of any contract entered into between the respondents and libellant, engaging him as master, or corresponding in substance with the agreements alleged by him in his libel, I must pronounce against his demand for damages.

Libel dismissed, with costs.

THE ATLANTIC.

Where, in answer to a libel for wages, the claimants set up a discharge of libellant in a foreign port by order of the consul, it is incumbent on them to set forth in their answer a state of facts justifying the discharge relied on, and to support the allegations by adequate proof.

The discharge of a seaman in a foreign port (under the acts of February 28, 1803, and July 20, 1840,) can be ordered by the consul, only upon the consent of the seaman, given, or proved before-him.

The party relying upon such discharge in defence to an action for subsequent wages, must show the fact that such consent was given.

To entitle an instrument to the respect accorded to documents under official signature and seal, the signature must be legible, and the impression of the seal sufficiently distinct to allow the vignette and motto to be distinguished.

In answer to a libel for wages, the claimants set up a stipulation in the shipping articles in bar of the recovery. The libellant served a replication in the usual form, but contended, upon the trial, that the stipulation relied upon was void.

Held, 1. That so far as the claim to treat the stipulation as void might rest upon any matters of fact outside the stipulation itself, the question was not raised by the general replication; but the libellant ought, either by an amend-

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ment of the libel or by a special replication, to have introduced into the pleadings averments contesting or avoiding the apparent bar contained in the stipulation.

2. That the question, whether the stipulation was not void in point of law in itself considered, and apart from any extraneous facts, might be raised on the general replication, and should be considered as if it had arisen upon demurrer or exception to the answer.

As a general rule, seamen are competent to bind themselves by a contract with the master and owners; and in the ordinary case of a hiring for money wages at a specific rate, the contract of the seaman in respect to the rate will be upheld. The contract of a seaman in respect to his compensation will likewise be upheld where the mode of compensation contemplated is by a proportional division of the earnings of the vessel among the owners, officers, and crew.

Shipping articles entered into for a whaling voyage, and contemplating the payment of the officers and crew by "lays" or shares in the vessel's earnings, contained a stipulation that either of the officers or crew who might be prevented by any cause from performing their duty during the whole of the voyage, should receive of his lay only in proportion as the time served by him should be to the whole time of the voyage.

Held, That this stipulation would be sustained; even without evidence that special explanation of it was made to the seaman.

A mariner receiving injury in the performance of his duty is entitled to be treated and cured at the expense of the ship; and this is equally true, whether his compensation is by specific money wages, or by a share in the earnings of the vessel. As a general principle, the liability of the ship in this regard is limited to the reconveyance of the disabled mariner to the United States, or to such period of time as may be reasonable, to enable him to return thither; but this rule is liable to variations.

THIS was a libel *in rem* by George Stotesburg, against the ship Atlantic, to recover wages, and also the expenses of libellant's cure for injuries received during his service on board.

The libel stated the following facts: That in July, 1845, the master of the Atlantic, then in the port of New London making ready for a three years' whaling voyage to the Northwest coast, shipped the libellant as green hand for such voyage, on the two hundred and twenty-fifth lay or share of what should be taken by the ship, as the libellant's wages. That the libellant signed the shipping articles, *in which the contract was fully set forth*. That in August following, he entered

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upon the service of the vessel, under the agreement, and the vessel, with the libellant on board, proceeded on her intended voyage, and cruised for about seven months, when she arrived at Maui, one of the Sandwich Islands. That on March 16, 1846, the ship being yet at Maui, the libellant, while in the performance of his duty, *fell from the maintopsail yard*, and was so severely injured that he was taken ashore to the hospital, where he remained confined to his bed for about twenty-one months. That while he was in the hospital, the ship proceeded on her cruise until November, 1847, when she started for home, and on her way touched at Maui, and took the libellant on board, and then proceeded to the port of New London, where she arrived April 20, 1848; having taken a cargo of which the two hundred and twenty-fifth part claimed by the libellant was averred to be of the value of \$300 and upward, which he claimed to recover from the ship.

The libel further stated, that by reason of the injuries received by libellant in his fall, he had lost the use of one of his legs, and one of his arms had been rendered almost useless; that he had already incurred great expense for medical advice, and must incur still more before he could be fully restored; and he claimed to recover from the ship "his reasonable expenses already incurred, and hereafter to be incurred in his cure, and his reasonable support since his injury and till he shall be cured."

The answer stated that the libellant shipped on board the Atlantic as alleged in the libel, except that he shipped as carpenter's mate instead of green hand, and that no limit of three years or otherwise was set to the duration of the voyage.

The answer then set up as a defence to the claim for wages a clause in the shipping articles, which was in these words: "It is also further agreed between the owner of said ship Atlantic on the one part, and the captain, officers, and crew on the other part, that if the captain, officers, and crew, or either of them, are prevented by sickness or any other cause from

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performing their duty during the whole of said voyage in said ship Atlantic, that any of them so falling short, shall receive of their lay or share *in proportion as the time served or duty performed by them is to the whole time said ship is performing her voyage.*" And it was also charged, in respect to the injury received by libellant, that the accident with which he met was not occasioned by his being engaged in any unusual duty, or by any agency or through any fault of the master, or of any officer of the ship, but through want of sufficient care on the part of the libellant.

The answer further showed, that on the libellant's being placed in the hospital at the port of Lahaina, at Maui, *the libellant was discharged from the ship* with his own consent, and by the authority of the United States consul at the port. That the master of the ship then produced to the consul the list of his ship's company certified as required by law, and paid to the consul \$36, being three months' wages of libellant, for which the consul gave his receipt, together with his certificate that the libellant had been discharged from the ship according to the laws of the United States. That on the return of the vessel to the port, the United States consular agent put the libellant on board the ship as a sick and disabled seaman, to be carried as passenger to the United States, and that he was so received and brought home. The answer further stated that *advances* had been made to the libellant, which more than paid the amount due him upon his lay or share under the stipulation in the shipping articles before mentioned.

To this answer the libellant filed only a general replication in the usual form.

The cause was heard upon depositions and documentary evidence; the important points of which are adverted to in the opinion of the Court.

Burr & Benedict, for libellant.

I. The rule of the maritime law is well settled from the

earliest periods, that a seaman taken sick shall be cured and tended at the ship's expense, and have his whole wages; if he be hurt in doing his duty, and in rendering services to the master or the ship, he must be cured and indemnified at the expense of the ship; if he be disabled for life in defending himself or the ship, he must be provided for, for life, at the ship's expense. *Cleirac*, 25, on art. 6 of Laws of Oleron; *Laws of Oleron*, art. 6, 7; of *Wisbuy*, art. 18, 19; of *Hanse Towns*, art. 39; *Pardessus*, passim, 1 *Valin*, 721; 2 *Ib.* 167; 2 *Boulay-Paty*, §§ 9, 10, 11, tit. 5; *Abbott on Shipp.* 622, 624, note; *Harden v. Gordon*, 2 *Mason*, 541; *The Brig George*, 1 *Sumn.* 151; *Reed v. Canfield*, *Ib.* 195; *The Forest, Ware*, 420.

II. This law is dictated by humanity and policy. "The Spaniards are the most unkind and indeed unjust to their sick mariners of any people, for they neither pay them any wages, nor maintain them, unless they pay others to serve in their stead." 1 *Pet. Adm. R.* App. 107, note; *Sea Laws*, 203; *Translation of Cleirac*, note to art. 45 of Laws of Hanse Towns. "Public policy, as well as the ordinary claims of humanity, demands that the interests of the seaman should be linked, in these respects, to those of the ship." *The Brig George*, 1 *Sumn.* 155. All the ancient codes and their commentators, and the uniform current of modern decisions, agree in the rule and the reasons of it.

III. The claimants, however, insist that the rule is confined to seamen who ship by the month, and does not apply to seamen on whaling voyages, whose wages are usually a share of the profits. It is not easy to see how the mode of hiring should alter either the humanity or the policy of the law, or in any manner change the rule. In length of voyage,—in absence from friends and the comforts of civilized life on shore,—in purely maritime service, and perils, and hardships,—in the great profits and national benefits which result from his labors,—and in the necessity of being kept in good condition, the whaling seaman is the mariner *par excellence*.

IV. A participation in the profits of the voyage is believed to have been originally the mode of compensation of mariners in all employments, and by degrees the capitalist took the profits, and the mariner had fixed wages; but in the fisheries the original and primitive plan has always prevailed with modifications. In the time of Cleirac there were six modes of hiring mariners. 1. By the voyage or by the run—a fixed sum. 2. By the month, week, or day. 3. By the distance—so much a mile or league. 4. By a share of the freight. 5. By the right to put so much freight on board belonging to themselves or others. 6. The most common—part in money and part in the right to put freight on board. *Cleirac*, 38, §§ 32–34; *Laws of Oleron*, art. 19, 28, 29. All the cases in which mariners are spoken of, in the codes and elsewhere, make no distinction in their rights and duties, depending on the mode of payment. *Pardessus*, *Lois Mar.* passim; *Laws of Oleron*, art. 19; *Laws of Wisbuy*, art. 35; 1 *Pardessus*, 382, 485. Their rights belong to them as “mariners,” “matelots,” and not as paid by the month or otherwise.

V. The whaling business existed before the codes and the commentators. The Biscayans were the first people who prosecuted the whale fishery as a regular commercial pursuit. They carried it on with great vigor in the twelfth, thirteenth, and fourteenth centuries. *Encyc. Am.* art. Whale-fishery. The whale-fishery is one of the oldest, most profitable, and purely maritime commercial pursuits. *Cleirac*, in his notes to art. 44 of the *Laws of Oleron*, (p 119,) devotes more space to this subject than to any other in his whole commentary. Twelve closely printed and interesting pages are devoted to the history, mode of conducting, and commercial importance of this great maritime pursuit. It was conducted then, as now, on shares. Not only the men in each vessel were paid in shares, but several vessels often went on shares. Those who pursued it were always subject to the maritime law, and to the jurisdiction of the Admiralty, except in England, since

the masters of the English Admiralty have prohibited it from exercising its jurisdiction. 2 *Valin*, 794; *Curtis on Merch. Seam.* 71, 353.

VI. "Although seamen in whaling voyages are compensated by shares of the proceeds, this compensation is always treated as in the nature of wages. They are never deemed partners, although they may be said to partake of the profits of the voyage. The apportionment of the proceeds is only a mode of ascertaining their compensation." *Reed v. Canfield*, 1 *Story*, 203, 204. This was a case of a seaman injured on a whaling voyage, and shows that the modern rule, like the ancient one, extends to whaling seamen as well as others.

VII. It is said, however, that the mariners contracted in the articles that they should not be paid for time lost by sickness. The clause in the articles is a most extraordinary one. 1. Its inhumanity and impolicy in connection with whaling voyages is most manifest. It leaves the sailor after eight months' service sick and unprotected, 12,000 miles from home, on an island in the sea, without a dollar. It makes it the pecuniary interest of the officers to have the men sick, or to disable them, or confine them, or disrate them, or put them off duty, during that large portion of the voyage when there is little to do. It makes it the interest of the seaman to shrink from peril and exposure. Every accident or a cold must cost them a portion of their lay. 2. It also makes the measure of compensation two things which cannot be correctly measured—relative health and labor. How long must he be sick, and how sick, and how much labor shall he fail to do? Shall every hour be deducted, or must it run to a day, a week, or a month? Shall every headache, and stiff joint, and swelled finger, that impairs his efficiency, take away a portion of his wages?

VIII. Courts of Admiralty are in the habit of watching with scrupulous jealousy every deviation from the principles of the maritime law; and when any stipulation is found in

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the shipping articles which derogates from the general rights and privileges of seamen, Courts of Admiralty hold it void, unless the nature and operation of the clause be fully and fairly explained to the seaman, and an additional compensation is allowed. *Brown v. Lull*, 2 *Sumn.* 449, 450; *The Juliana*, 2 *Dods.* 504; 2 *Mason*, 541, 556; 3 *Kent*, 193; *The Minerva*, 1 *Hagg. Adm. R.* 347; *Abbott on Shipp.* 609, § 3, and 610, note, and cases cited.

IX. It is not material whether the articles be in the usual form, or what is the custom of New London. It is the departure from the principles of the maritime law, and the general rights of seamen, and not the departure from the usual form of articles, or from the custom of a particular place, that avoids the clause. All articles are stuffed with void clauses. *Abbott on Shipp.* 609, § 3; *The Minerva*, 1 *Sumn.* 158; *Curtis on Merch. Seam.* 57, note.

X. There is no evidence that the articles were explained to the libellant, nor that he received any additional compensation, nor that he knew of any custom or was bound by it. It is not to be presumed from his signing articles at New London. *Harden v. Gordon*, 2 *Mason*, 558; 1 *Sumn.* 158; 1 *Hall, R.* 631, 632.

XI. This clause may be construed consistently with the maritime law. The Court will therefore so construe it. 1. It may reasonably apply only to cases in which seamen, from sickness or other cause, needlessly or wrongfully, or by consent of the consul, leave the service before the voyage is up,—or only to provide that in cases in which a seaman for any cause should not be entitled to be paid for the whole voyage, that he should be paid his share of the whole voyage ratably to the time, and not be entitled or restricted to his share of what was taken before he left. 2. Does he not do his duty who does all he can? By either of these constructions, the rule of the maritime law is unimpaired, and the libellant is entitled to recover his entire wages.

XII. There is nothing in the articles to impair his right to

recover the indemnification for the injury received in the services of the ship. That stands under the maritime laws. The clause in the articles only relates to wages.

XIII. The alleged discharge of the libellant in Maui the morning after the accident is not proved. The consular certificate is not evidence of a discharge. It is only a certificate that the seaman was left there sick, to save the captain's liability on his bond to the collector if the ship should not return to Maui. The consul has no jurisdiction to discharge a man except in cases of joint application or consent, of which this does not appear to be one, there being no pretence of any consent, and the man was not in a situation to consent, and it would have been brutal to ask him.

Asa Childs, for the claimants.

I. The libellant's claim is founded on the special contract. He does not set up the relation of a mariner to the ship, and claim wages, and the expense of his cure from the ship, as the result of that relation in virtue of the maritime law; but he sets up this contract, alleges he signed it, and making it the ground of his claim, asks the Court to decree its specific performance, and give him his share of the products of the voyage. 1. Now, either the contract is in force or it is not. If it is not in force, or is abandoned, then it is certain this action cannot be sustained. If it is in force, then the duty of the Court is to ascertain its import, and giving it a fair legal construction, to enforce it. But in respect to compensation, the rights of seamen are and always have been matters of contract. The maritime law, like the common law, will imply a contract to pay wages, in the absence of an express contract, upon the principle of a *quantum meruit*, but it leaves parties free to make their own contracts, and when there is a contract made it will enforce it. The whole regulation as to shipping articles rests upon this recognition of the right of parties to make contracts. 2. Whatever may be the rules of the maritime law as to the rights of parties, it is perfectly well settled

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that they may be controlled by special contracts in respect to the parties themselves. 1 *Pet. Adm. R.* 113; *Ib.* 186; *Ib.* 214. 3. It is not denied that the contract, to be valid, must be fairly and honestly made. But the law as to seamen is in this respect the same as the law as to other men. Acts of oppression, cunning, deception, introduced into contracts, Courts will protect the parties against. Inequality in terms, disproportions in bargains, sacrifice of rights on one side only, not compensated by benefits on the other, Courts will pronounce unjust, and regard as evidence of fraud. 4. All the rules as to the illegality of provisions inserted in shipping articles, and all the grounds for showing special favor to seamen by Courts, rest upon either their liability to be imposed upon, in consequence of their peculiar relation, or actual fraud practised upon them. But even in the extreme cases, if the contract is fairly made, the parties are bound by it.

II. The contract now under consideration can be affected by none of the principles referred to. It is not a contract imposed upon seamen by the master or owners of a ship. It is in the nature of a copartnership. *Abbott on Shipp.* 5th Am. ed. 915. The owners, officers, and men have associated to pursue a particular business. The owners furnish the ship, the officers and men agree to do the work; and they are all by their agreement to be interested jointly in the whole enterprise. They all unite in a mutual covenant, and for their own protection submit to the authority of the captain, and prescribe their own terms of interest. The men are not laboring for the owners, but for themselves, as much so in every sense as the members of a mercantile firm. The business in which they engage is not a trading voyage, but rather a manufacturing business. Except the time spent in passing from port to their fishing ground, they are engaged in the actual labor of procuring oil and bone, &c. The early business of catching whales and other fish was carried on by companies collected in tents on the shore, and had no connection with

shipping business whatever. The peculiar rules adopted in maritime ports for the regulation of seamen in trading voyages—men employed simply to navigate ships—cannot be applicable to such an association as this.

III. This contract was fairly made. It is in the form used at the port where made by every company engaged in the business for thirty years. It is free from all suspicious circumstances. It is signed by the libellant, who writes a good hand, and furnishes evidence of having been understandingly executed. There is no pretence of unfairness. The captain and officers are all subject to the same rules, and have signed the same articles.

IV. The contract is reasonable in its terms, and equal as respects all parties. Every man is to receive the fruit of his own labor for the time he shall perform his duties. In a trading voyage from port to port, where the seamen take charge of the owner's ship, and expose themselves to danger for his exclusive benefit, there may be a reason and it may be just that he receive his wages from the owners, though sick. But this is not such a voyage. The voyage is without limit; the crew are to engage for themselves, as well as the owners, in a particular enterprise, to work as long as circumstances shall seem favorable. If a man fails to continue with his associates, and another person is procured in his place, the loss should be his own, and not fall upon his associates. At any rate, a contract so providing is not unjust or unreasonable. It is not just, it is not right, that the earnings of others should be transferred to him. The question is not, what shall be done to cure a sick man; but the question is, can it be said to be an unreasonable provision in a contract that he shall not, as a pecuniary interest, receive the fruit of other men's labors. Bear in mind this is not a claim against owners of the ship for wages, but against the associates in the enterprise, to obtain a part of their earnings.

V. The principle adopted by Story in 2 Mason, 541, and

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2 Sumner, 449, that where a contract imposes unusual hardships on a seaman without extra compensation, or deprives him of rights secured by the mercantile law, the Court will presume the contract to be fraudulent, does not apply to this case. No such unusual hardships are imposed, no ordinary rights are taken away. This contract stands like every other contract brought before the Court, presumed upon well-settled principles of law to be fair till the contrary is shown. Admit that a contract on its face apparently unjust imposes upon the party who sets it up the burden of proving it to be fair. This contract contains no provisions which justifies any presumption against it.

VI. As to the claim of the libellant, that he is to be cured at the expense of the ship, no question of any practical importance can arise. He was placed in the hospital at the Sandwich Islands, and all the expenses paid by the captain. He was brought home at the expense of the United States. His board bill and his surgeon's bill at New London, and all his expenses, were paid by the owners. . . .

VII. The libellant was discharged according to law at the Sandwich Islands, and this would be conclusive against his claim to be cured at the expense of the ship. 1. The consul had a right to discharge him. Act of July 20, 1840, 5 *U. S. Stats.* 394. 2. His certificate is that he was discharged according to law. 3. The presumption of law is that a public officer has done his duty. 4. The payment of \$36 is confirmatory evidence that the consul discharged him according to law. 5. His sending him home as a disabled seaman proves that he was discharged.

BETTS, J. The libellant shipped at New London in July, 1845, as carpenter's mate, on a whaling voyage.

In consequence of injuries received by him, in the discharge of his duty, he was taken on shore in the port of Lahaina, in the island of Maui, one of the Sandwich Islands, and left in

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the hospital there. The ship proceeded on her voyage, and after completing her cruise, touched at Maui, on her return home, and received the libellant on board, he being placed there as a sick and disabled seaman by the consul, and was brought to the United States, the master receiving \$10 passage money from the consul therefor.

The libellant now demands wages for the whole voyage, together with the expenses of his cure.

There are disagreements in several particulars between the statements of the libel and those of the answer, but they do not essentially affect the points upon which the cause turns, and accordingly no time will be spent in the consideration of them.

The questions in the case are three :—

Was the libellant discharged from the ship at Maui, so as to terminate the shipping contract, and exempt the vessel from all further liability in consequence of his shipment ?

Was the condition contained in the shipping articles, limiting the libellant's compensation or wages to the time he was actually on board and capable of rendering the services he contracted to perform, a legal condition and obligatory upon him ?

Is the ship chargeable with the expenses of the libellant's cure ? and if so, to what extent ?

1. It is incumbent on the claimants to set forth in their answer, a state of facts justifying the discharge of the libellant in a foreign port, and to support the allegations by competent and sufficient proofs.

They plead that the libellant, on March 16, 1846, fell from the topsail yard of the ship through want of sufficient care on his part, and was so severely injured by the fall, and became so sick in consequence of it, that he was rendered unable to perform his duty on board, and was, at his own request, and by order of the captain, and by aid of the consular agent, placed in the hospital. That on March 18th, he was dis-

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charged from the ship by his own consent, and by the consent and authority of Giles Waldo, the United States consul at that port, the master of the ship having produced to the consul the list of the ship's company, certified according to law, and having paid to the consul the sum of \$36, being three months' wages to the libellant.

The evidence to support this discharge is a certificate,—represented to be under the consular seal, but the impression of the seal is too faint to admit of its being deciphered,—attached to the articles, and expressed in these terms :—

UNITED STATES CONSULAR AGENCY, }
Lahaina, Hawaiian Islands. }

“I, the undersigned U. S. Consular Agent, do hereby certify, that George Stotesburg has been discharged from ship Atlantic on account of sickness and in accordance with the laws of the United States.

“Given under my hand and seal this 18th day of March, 1846.

GILES WALDO,
U. S. Consular Agent.

“By A. H. Linigsyez,” (or some other similar name, not easily determined from the signature.)

On another paper a memorandum or account is made in this form :—

“Ship Atlantic and owners to U. S. Consulate.

3 months' wages to Stotesburg,	\$36 00
Certificate	2 00
	\$38 00

Rec'd payment,

(Signed as above.)

Lahaina, March 18, 1846.”

These papers are all the evidence produced to support the allegation of the answer, that three months' wages had been

paid to the commercial agent, and that the discharge had been given under the authorization of the act of Congress of February 28, 1803. 5 U. S. Stats. 396.

The discharge, however, manifestly was not made in conformity with the provisions of the statute; for the cardinal requisite to the exercise of that authority is, that application for the discharge shall be made *by both the master and mariner*; and it is not even certified that the consular agent acted on any such application; on the contrary the proofs import that the libellant was sent ashore by direction of the master, and under expectation that he still remained connected with the vessel as if he had continued in her. The Court cannot assume that the assent of the libellant to his discharge was given, merely upon the fact of his being left in a hospital in his then maimed and dangerous condition; nor upon the assertion of the person acting for the consular agent that the libellant was discharged from the ship in accordance with the laws of the United States. It is unnecessary to inquire, whether an averment in such certificate that consent was given by the seaman and master in the presence of the consul, or was proved to him, would justify the discharge without other evidence of the fact, because the certificate contains no such allegation. Indubitably the particular which gives authority to consuls to act in this behalf under the statute, must be duly established, or his proceedings will be a nullity. This is a special power and trust confided to consuls and commercial agents, and must be exercised by those officers strictly in pursuance of the directions of the statute.

Nor can the payment of \$36 wages made to the consul by the master, be accepted as a payment of the three months' wages prescribed by the act. The hiring was for a share of the takings on an entire whaling voyage; and the rate of the lays could not, by the method of apportionment appointed in the articles, be applied with any justness to the period of service which had then elapsed. The vessel was on her outward

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cruise to the fishing grounds, and it would be evidently unjust to measure the compensation of the libellant by lay shares out of the chance takings on that part of the cruise. The takings of the entire voyage was the basis upon which the libellant's share should be computed. Twelve dollars per month was evidently adopted as an arbitrary allowance of wages. It might chance to be more advantageous to the libellant than his lay of the earnings of the adventure, apportioning the time he was in the ship with the entire duration of the voyage. Still, it might be disproportionately short of his share. And it certainly was not competent to the master and consular agent to determine that matter without the clear understanding and concurrence of the libellant. I think, therefore, there is not in this discharge that conformity with the requirements of the act of 1803, which will uphold it to protect the ship. *Jay v. Almy*, 1 *Woodb. & M.* 270.¹

The act of July 20, 1840, (5 *U. S. Stats.* 394, c. 48, §§ 5, 6, 9,) empowers consuls and consular agents abroad, to discharge seamen from their contracts or their ships, and to exact the payment of three months' wages, or even more, or to dispense with it as in their judgment they may think expedient. This power can be exercised but in two cases,—upon the application of both the master and the mariner, or upon that of the mariner alone. The master can act in the matter only jointly with the mariner. And it is not enough for the consul to certify that he gave the discharge "lawfully," or that he gave it "in accordance with the laws of the United States." It must be made to appear upon what grounds he proceeded. The Court cannot intend that it was on the joint request of the master and seaman; nor that it was on the sole application of the latter, nor even that one or other ingredient of fact actually existed. The power imparted to consuls is limited and specific in character, not appertaining to him *virtute officii*,

¹ Compare *Hutchinson v. Coombs*, *Ware*, 65; also *Minor v. Harbeck*, *post*.

but conferred by a statutory provision ; and the law raises no presumption or intendment in support of his doings, until it is shown that his jurisdiction attached to the subject,—that a case had occurred falling within the scope of his powers. The rule is coeval with the existence of statutory or limited tribunals or officers, that their doings must be made to appear to be within their authority, and that nothing can be supplied in support of their jurisdiction by intendment. 1 *Co. Inst.* 117 ; 2 *Co. R.* 16 ; 1 *Lilly, Abr.* 371 ; 1 *Levinz*, 104 ; *Powers v. The People*, 4 *Johns.* 292 ; *Atkins v. Brewer*, 3 *Cow.* 206 ; *Grignon v. Astor*, 2 *How.* 319 ; *Bennett v. Bush*, 1 *Den.* 141. Nor is it sufficient for the officer to aver ever so positively his jurisdiction. He must set forth the facts necessary to confer it, and those jurisdictional facts must be established by proof. *The People v. Koebar*, 7 *Hill*, 39, and cases cited.

I do not discuss the question raised respecting the sufficiency of the proof, that Giles Waldo was the consular agent of the United States at Lahaina, or that the gentleman who has subscribed the act for him, was his legally authorized substitute. Admitting that the seal of the consulate imports a legal authority in the person using it to do all official acts appertaining to the office, still the case calls for the remark, that the papers should present a distinct impression of a seal so that it may be identified and discriminated. The paper before the Court does indeed bear a faint similitude of a seal, but neither vignette nor motto is distinguishable ; and the vague flourish employed for a signature, affords no means by which the authentication of the discharge can be verified.¹

2. To meet the claim for wages during the period of the libellant's disability, the answer sets up a stipulation in the

¹ That a regular and valid consular discharge, properly certified, is conclusive on all points duly passed upon by the consul, unless his conduct be proved corrupt or fraudulent, see *Lamb v. Briard*, *ante*, 367 ; *Tingle v. Tucker*, decided April, 1849, reported *post*, in its order.

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shipping articles signed by the libellant, whereby it was agreed that if either of the officers or crew should be prevented by sickness or other cause from performing their duty during the whole of the voyage, he should receive of his lay or share only in proportion as the time served or duty performed by him should bear to the whole time the ship should be in performing the voyage.

A general replication to the answer is filed by the libellant, which has only the effect to put both parties to the proof of the allegations in their respective pleadings not admitted to be true, (*Dist. Ct. Rules*, 88) ; or of permitting the cause, when the answer operates as a plea in bar, to be set down for hearing upon the libel and answer alone. *Dist. Ct. Rules*, 78. That rule allows the libellant to treat the answer as a plea in bar, and by so replying to it, save himself from the consequences of admitting its truth, which he would do in effect by setting it down for hearing on a general replication.

• It may admit of question whether the Supreme Court Rules (*Rule 27*) do not, by fair implication, take away the right of a claimant or respondent to interpose a formal plea or demurrer on the merits to a libel or information in Admiralty, and whether he is not limited to a defence by answers alone. See *Sup. Ct. Rules*, 27. The rule, however, does not import that he can interpose no other defence than a denial or admission of the facts. The facts may be undisputed, and yet supply no cause of action ; or the defendant may be able to adduce other facts avoiding the effect of those alleged by the libellant, or he may possess matter of estoppel and bar which the Court could never intend he should be precluded from using, without his being also compelled to make formal denial of the facts set up by the libel. Certain Logs of Mahogany, 2 *Sumn.* 589 ; *Pratt v. Thomas, Ware*, 427. The provisions of the Supreme Court Rule must be deemed satisfied if the defendant, whether or not required by the libel, replies to the allegations in the libel by a full and explicit

answer. The special replication authorized by the District Court Rule, may thus be urged to create a triable issue upon the merits. This is the practice in Equity. *Sup. Ct. Rules*, Equity. There would be equal conveniency and fitness in applying it to pleadings in Admiralty.

The Supreme Court Rules indicate no method of pleading applicable to such case, unless it be embraced in the right to amend the libel. *Rule 24*. That would necessarily lead to a new answer, and would by no means further the simplicity in pleading which was regarded by Congress as an object of cardinal importance in authorizing the Supreme Court to regulate Admiralty proceedings. Act of August 23, 1842, 5 *U. S. Stats.* 518, § 61.

In the summary of the practice of this Court, it is stated that the replication to an answer as to a plea, may, in case of urgent importance, be special or double; but ordinarily it should take a single issue upon the allegations of the answer, however multifarious those may be. *Betts's Adm. Pr.* 50. The practice in the District of Louisiana appears to be essentially to the same effect, (*Waring v. Clark*, 5 *How.* 441,) but in general, special replications to answers would not seem to be in use, in American Courts of Admiralty, unless demanded by the libellant. *Dunl. Adm. Pr.* 197; *Coffin v. Jenks*, 3 *Story*, 108, 121.

It is otherwise in the English Admiralty, although an eminent compiler appears to regard the practice as irregular. 2 *Browne's Civ. & Adm. L.* 365, 415. Pleas in bar may be interposed, with the right to plead generally afterwards, (*The Sarah Jane*, 7 *Jur.* 659; *S. C.* 2 *W. Rob.* 110,) and a reply or rejoinder contradictory to the allegations in the answer, or setting up new matter, are of constant use in the English Admiralty. *The Aurora*, 1 *W. Rob.* 325; *The Anne and Jane*, 2 *Ib.* 104; *The Hebe*, *Ib.* 146, 152.

Manifestly, then, the libellant ought to have introduced into the pleadings, either by an amendment of the libel after the

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answer was interposed, or by special replication to this branch of the defence, such averments as were necessary to enable him to contest or avoid the bar to his recovery supposed to be contained in the stipulations of the shipping articles, which he admits he signed and that they contain the true contract with him.

His counsel, however, insist that he has a right to treat the engagement as a nullity, without alleging any facts impugning it; and that the Court, as matter of law, must pronounce an agreement of that description, entered into with a mariner, to be nugatory and void, in respect to him.

In considering the question thus raised, I shall regard the objection urged to the defence founded upon the stipulation, as if it arose upon demurrer or formal exception to that part of the answer.

It is not to be denied that a common sailor is competent to make a shipping contract. Indeed, the statutes of both the United States and England imperatively impose on masters the duty of entering into contracts in writing with seamen employed by them. And the acts of Congress clearly imply that such contracts will be valid although operating to the disadvantage of the mariner even in their most essential feature,—the rate of wages,—for they make that a particular which must be stipulated, and on omission by the master to have a written contract, they give the mariner a chance of higher wages than he may have bargained for verbally, by allowing him to demand the highest current rate at his port of shipment. Act of July 20, 1790, 1 *U. S. Stats.* 131, ch. 29, § 1; Act of July 20, 1840, 5 *Ib.* 395, § 1, arts. 3, 10, 19. The written or printed shipping articles must now “contain all the conditions of contract with the crew as to their service, pay, voyage, and all other things.” Act of July 20, 1840, 5 *U. S. Stats.* 395, § 3.

It is remarkable, that the act of Congress of July 20, 1790, in specifying the constituent parts of a contract with seamen,

should omit the rate of pay or wages he was to receive. By the provisions of that act the agreement must "*declare the voyage or voyages, term or terms of time for which such seaman or mariner shall be shipped.*" § 1. The act of July 20, 1840, assumes that the rate of wages is a component part of shipping articles, (§ 3,) and the Courts, previous to that enactment, always enforced against masters of vessels the obligation to stipulate the rate of pay as an essential part of the written contract. *Bartlet v. Wyman*, 14 *Johns.* 260; *Johnson v. Dalton*, 1 *Cow.* 543; 3 *Kent*, 4th ed. 177; *Gilpin*, 305, 452. The English statutes moreover are precise and unequivocal upon this point. *Abbott on Shipp.* 607. See 3 *Kent*, 196, note c, where a summary of the last English act is given. The English and American Admiralty have, in many instances, interposed to protect seamen against stipulations introduced into shipping articles, not demanded by statute, and which were in abridgment of their rights under the law maritime, and where no adequate compensation was secured them as an equivalent for the rights relinquished. *Abbott on Shipp.* 722; *Curtis on Merch. Seam.* 44; 3 *Kent*, 6th ed. 193, note. But they have uniformly held that the shipping articles are conclusive as to the wages, where no fraud or deception is proved.

Upon these principles it would seem to result, that the mariner can act in forming a contract for wages or compensation with the same authority, and can bind himself to the same degree as any other contracting party, where specific wages for a period of time, or for a voyage or cruise are agreed upon, or where any other special mode of compensation is adopted. *The Sidney Cove*, 2 *Dods.* 11; *The Mona*, 1 *W. Rob.* 137; *The Riby Grove*, 2 *Ib.* 52; *The Mariner's case*, 8 *Mod.* 379; *Howe v. Napier*, 4 *Burr.* 1944. The law has established no distinction which goes to invalidate his contract when coupled with conditions or qualifications to his right to recover the stipulated wages in full.

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The Courts have gone no further than to declare that they will scrutinize agreements to the seaman's prejudice, which are outside of the statutory requirements, or unusual in shipping articles; and will absolve the mariner from them unless it is proved by the master or owners that he clearly understood their character, and was secured a compensation correspondent to the disadvantages or restriction imposed upon him. 3 *Kent*, 193, and note; *Abbott on Shipp.* 722, and note. With this limitation the contract operates in respect to the mariner with no less efficiency than upon the owner.

Contracts for wages in money have become almost exclusively those now employed in general navigation by commercial nations. 3 *Kent*, 185. Shipping agreements are accordingly greatly simplified in comparison with what might be required were seamen now accustomed to be rewarded, as in the earlier periods of commerce, out of the freight or profits of the voyage, or by their own ventures on board. In defining and fixing the method of compensation in such cases, agreements might be required or appropriate, which should make the mariner's right to a full share, or to any share of the ship's earnings, dependent upon circumstances which ought not to affect a contract for money wages.

I do not find, in looking carefully through the ancient ordinances of maritime countries, any inhibition upon the right of a master or owner to make special contracts with seamen in voyages for freight or profits, or any exoneration of seamen from the obligation of their special agreements in relation thereto. Both parties were considered as acting in concert and by mutual consent in arranging the terms upon which the voyage was to be undertaken and in conducting it after it commenced, (*Laws of Oleron*, art. 16; *Laws of Wisbuy*, art. 32,) and as having a common interest in the direction of the vessel. *Laws of Oleron*, art. 21. In all critical emergencies the advice or opinion of a major part of the ship's company determined the matter. *Laws of Oleron*, art. 2; *Wisbuy*, art.

14, 21. The laws secured to seamen certain advantages of venture or *portage* in shipping portions of the cargo on their own account, (*Laws of Oleron*, art. 16; *Wisbuy*, art. 30; 1 *Pardessus*, *Lois Mar.* 336; Lubeck, art. 10; Hamburg, art. 9,) and the privileges were sometimes in addition to money wages; at other times they constituted the entire compensation. 3 *Pardessus*, 340. These provisions denote that the mariners, in a common adventure, had a concurring voice with the owners and master in controlling its management, and could regulate, at their own discretion, the privileges they were to have in the voyage. No intimation is made that they were under tutelage or disabilities in that respect, so that their engagements would be voidable if varying from the familiar formula adopted in money hirings.

Whaling voyages, as conducted in England and in the United States, form a species of navigation bearing considerable similitude to the ancient method of rewarding seamen by shares of freight earned, but very little, if any, with the system of employment on money wages, which forms the basis of ordinary shipping agreements. They are held not to be strictly copartnerships, (*Abbott on Shipp.* 705; *The Phebe*, *Ware*, 263; 3 *Kent's Comm.* 185,) yet they are mutual concerns, involving an entire reciprocity between owners and mariners in respect to the profits and losses of the adventure. 1 *Boulay Paty*, 197, § 7; *Cleirac*, *Cout. de la Mer*, 66, note 2. They result in communities or associations, in which each and all take a common risk, and are mutually entitled to a profit. The owner supplies the ship, her equipment, and stores, and the officers and crew contribute their services, and an agreed ratio of remuneration out of the earnings of the enterprise is allotted to these respective interests. The proportions in this distribution will, from the nature of the case, be exceedingly dissimilar, and are invariably the subject of express agreement, because not a matter capable of adjustment by

the Courts on any principle of legal or equitable merits between the parties.

It is somewhat singular that an interest of such magnitude in this country as the whaling business, should not have been regarded by Congress as deserving regulation by law as much as fishing voyages, or ordinary trading ones. No statute has, however, fixed the rights of parties in these adventures, or required their agreements to be in writing. Chancellor Kent is mistaken in supposing that the act of June 19, 1813, (8 *U. S. Stats.* 2, ch. 2,) applies to whaling voyages. 3 *Kent*, 178. It is limited to the bank and other cod fisheries. But a species of usages, adapted to the necessities of these adventures, are growing into practice, which the Courts seem disposed to favor, and which may soon acquire the character and usefulness of authoritative ordinances. *Curtis on Merch. Seam.* 394, App. 2; *Barry v. Coffin*, 3 *Pick.* 115; *Baxter v. Rodman*, *Id.* 435.

The contract brought before the Court in this case is a fair representation of the terms upon which these engagements are usually arranged. If the limitation of the rights of the crew to shares in those takings only which they have aided in making be not of general use, the stipulation would seem in itself reasonable and appropriate, if entered into by the mariner with an understanding of its purport and aim. The exception taken in this case to the argument does not go to the provision as in itself inadmissible, but the scope of the objection is, that the stipulation is void for want of proof on the part of the owners that the libellant had it clearly explained to him, and that he was secured an equivalent for a general right to wages for the voyage surrendered by this clause of the engagement.

There are facts in evidence affording a strong implication that the libellant well understood this provision. The vessel was fitted out in the port of New London, and it is proved

that for a long period of years a like condition has been introduced into shipping articles signed at that port, and that for twenty years, or more, voyages have been made up and settled there upon that basis. The libellant, in his libel, evinces a familiarity with the contents of the shipping articles, as he asserts that his contract is fully set forth in them. He was a mechanic, a carpenter's mate, shipped at New London, and joined the vessel there; and in the absence of all evidence to the contrary, it will be implied that he was a resident of that place or vicinity, and he must be deemed cognizant of so old and notorious a custom in the line of business in which he engaged. His handwriting indicates a good education, and as he took a rate of wages above that of green hands and ordinary seamen or cooper's mate, and equal with that of seamen, it is also fairly inferable that the particulars of his compensation and the circumstances likely to affect it, were ascertained and particularly attended to upon his part.

But, in my opinion, the stipulation is not of that unusual or extraordinary character that any explanation of it to the libellant was requisite. It clearly was the customary one at that port, and it seems to be exactly adapted to the character of the adventure in which the parties were about to unite upon a ground of common interest. Upon the basis of recompense adopted, each party would be solicitous to secure the whole advantage of his own labor, and to prevent others from participating in profits and earnings towards which they had contributed no aid.

There was a legal and equitable equivalent for the engagement in its *mutuality*. It applied alike to officers and crew. Those who were to receive large shares and those whose portions were the smallest reciprocally surrendered and acquired like rights under it; and it is to be observed, that although the libellant was entitled to a precedence over portions of the ship's company, other portions had reserved to them shares much larger than his own. His chance of gain might thus,

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by their shares falling into the distribution fund, counter-balance his risk of loss. The adventure was in its nature one of hazard, and each person would naturally compute the chances as more likely to turn in his favor than against him, and would accordingly regard the stipulation as promising an advantage to himself.

I shall accordingly hold that the engagement was valid, and that the libellant cannot claim any part of the takings earned during the period of his disability.

3. The remaining question is, as to the liability of the ship in this peculiar engagement, to bear the charge of the libellant's sickness and cure.

The general principle applicable to the rights and liabilities of seamen is, that the shipping contract is presumed to include the provisions of the law maritime, except as varied or modified by express stipulation between the parties. The *Crusader, Ware*, 448; *Jameson v. The Regulus*, 1 *Pet. Adm. R.* 212; *Curtis on Merch. Seam.* 106. A fundamental doctrine applicable to mariners' contracts, and one regarded in the maritime law as forming a part of the contract, is the right of seamen to be cured at the expense of the ship, of sickness or injury received in the ship's service. *Jacobsen*, 144; *Abbott on Shipp.* 258; *Curtis on Merch. Seam.* 106, 111. Pardessus, in his compilation of marine ordinances and laws, collects the provisions upon this subject embodied in those edicts and usages. 1 *Pardessus*, 327, 471, 474; 2 *Ib.* 521; 3 *Ib.* 141, 374, 510, 518. See, also, 1 *Boulay Paty*, 202. Valin comments upon the import of several of the ancient ordinances which are embraced in Article XI. of the Ordinance of the Marine of Louis XIV.; and evidently regards them as being of universal obligation, including mariners employed under every method of hiring. 1 *Valin*, 721. The decisions of the American Courts rest upon and sanction the maritime codes of Continental Europe upon this subject. *Abbott on Shipp.* 260, notes; 3 *Kent*, 6th ed. 184-186, notes; *Curtis on*

Merch. Seam. 106-111. Seamen are entitled to be maintained and cured at the expense of the ship of sickness or injuries received while in her service. And Courts would receive with great distrust any engagement upon the part of mariners to dispense with or qualify this privilege, alike important to them personally in point of humanity and in view of wise policy, in aid of the navigation and commerce of the country.

The case of the libellant falls clearly within this rule, and nothing is shown in its character in any way detracting from his right to the full benefit of it.

The pretended discharge at Lahiana was of no effect upon the rights of libellant; for the reasons already stated; and his assent to be put on shore, if such assent is to be implied, was only in accordance with the direction of the master and the convenience of the ship. He still continued entitled to support from the vessel, and to all the advantages he would have possessed if put on shore without being consulted or against his consent, or if he had continued on board during the residue of the cruise.

In my judgment, therefore, there is no ground to question his right to be treated and cured at the expense of the ship.

The essential question is, what is the extent and duration of that charge, and how is its value to be measured in money?

The vessel must cover every necessary and appropriate expenditure made and responsibility incurred by the libellant during the period, for board, nursing, or medical treatment. The authorities above referred to fully support his right of recovery to that extent; and whether such disbursements have been made by him, or there is an outstanding liability on his behalf for them, may be a fit subject of reference and adjustment before a commissioner.

The main difficulty is, whether the libellant's disabilities still continue a charge upon the vessel after the voyage is fully

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completed, and if so, what is to be the legal termination of the charge.

The expression often employed in the various ordinances and in the decisions is, that mariners are entitled to be *cured* of sickness and wounds received in service of the ship.¹ This statement is clearly not to be taken in an absolute sense. That would involve impossibilities. Diseases and injuries so incurred are frequently in their nature, and in their direct consequences, incurable. An exposure to unusual labor or privations on the voyage may induce maladies permanent or irremediable in their character; thus broken limbs, or bodily debility resulting from services in the ship, are very often the sailor's heritage for the residue of his life.

Judge Story was manifestly laboring under uncertainty of mind whether the liability of the ship or owner was of indeterminate duration, and might be enforced so long as the necessity should continue. In *Harden v. Gordon*, (2 *Mason*, 541,) the rule was laid down with great amplitude, that the expenses of sick seamen were to be borne by the ship, including medicines, medical advice, nursing, and lodging. In *The Brig George*, (1 *Sumn.* 59,) this rule was restated, and applied to the case of a mate substituted as master by the consul abroad, and who was lodged and treated on shore. In *Reed v. Canfield*, (1 *Sumn.* 195,) the point was presented with more distinctness, as that was a case of disability continuing after the termination of the voyage, and which might probably last for the life of the sailor. Judge Story puts the inquiries:—"What are the limits of the allowance?" "May they be extended over years or for life?" "Are they to be like the pensions allowed by some of the marine ordinances in cases of wounds and other injuries received by seamen in defending the ship from the attack of pirates?" These are

¹ Compare *Ringold v. Crocker*, *ante*, 344.

interrogatories of great significance and weight, and it is to be regretted that the learned Judge has not relieved the subject of its pressing difficulties by a more full solution of the questions. He says,—“The answer to suggestions of this sort is, that the law embodies in its formulary the limits of the liability. The seaman is to be cured at the expense of the ship of the sickness or injuries sustained in the ship’s service. It must be sustained by the party while in the ship’s service; and he is not to receive any compensation or allowance for effects of the injury which are merely consequential. The owners are liable only for expenses necessarily incurred for the cure, and when the cure is completed, at least so far as the ordinary medical means extend, the owners are free from all further liability.”

This is sufficiently distinct as to the period within which the injury must have been received, or the sickness incurred. The ship can only be held liable for those events occurring whilst the mariner is attached to her. 1 *Pardessus, Droit Comm.* § 688. Still, the inquiry whether the cure required during the voyage is to be continued after its termination, is not met in terms by this decision, and seems to be left open for solution upon general principles. *Reed v. Canfield*, 1 *Sumn.* 195.

The British act of 7 & 8 Victoria, (c. 192, § 18,) lays down a clear and practical rule upon this subject. It enacts that, in case the master or any seaman shall receive any hurt in the services of the ship, the expense of medical advice, attendance, medicine, and subsistence for him “until cured, or brought to this country,” together with the costs of his conveyance thither, be defrayed by the owners without any deduction whatever from his wages. This is but a reënactment, in substance, of the provisions of the act of 5 & 6 Will. IV. c. 19. *Abbott on Shipp.* 170; *Ib.* 616. It is probable that the ancient ordinances referred to by Judge Story, were those cited by Cleirac, (*Cont. de la Mer*, 25, 26,) which provided that sea-

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men wounded in fighting for their vessel, should, besides their cure, be supported for the rest of their lives at the expense of the ship and cargo ; but I do not find this rule extended to ordinary cases of sickness or injuries in the merchant service. *Ord. de Oleron*, art. 7 ; *Cleirac*, 27. This was regarded as a general average charge. 9 *Code de Commerce*, art. 400. The French marine law, according to the commentary of Pardessus, limits the obligation of the master, in case of a seaman left sick abroad, to the providing for the charge of his sickness, and for the expense necessary to place him in a condition to return home. 1 *Pardessus*, § 688 ; 1 *Boulay Paty*, 202 ; The Littlejohn, 1 *Pet. Adm. R.* 117. The Code of Commerce leaves the subject without special legislation, (*Code de Commerce*, art. 262,) further than the general principle that the mariner shall be cured by the ship, and receive his wages without abatement. The term *cure*, was probably employed originally in the sense of *taken charge* or *care* of the disabled seaman, and not in that of positive *healing*. The obligation of the ship to the mariner would then be coextensive in duration to that of the mariner to the ship. Natural reason would seem to point to that limitation, it being the one consonant to the relation in which the law places the parties to each other, and by which it measures their privileges and liabilities under a shipping contract.

This rule may undoubtedly be subject to variations. When a course of medical treatment, necessary and appropriate to the cure of the seaman, has been commenced and is in a course of favorable termination, there would be an impressive propriety in holding the ship chargeable with its completion, at least for a reasonable time after the voyage is ended or the mariner is at home. So, also, in case due attention to his necessities has been unjustly omitted by the ship abroad, or his case has been improperly treated, the Courts may properly enforce against the ship this great duty towards disabled mariners, even after her contracts are terminated, upon the ground

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of a failure to perform towards them the obligation in the shipping contract. These particulars, however, are not stated as ingredients in the present case, but are referred to in illustration of the doctrine involved in some of the authorities, and to show they are not inconsistent with the general principle, that a seaman has no claim upon the ship or her owner for the cure of his sickness or disabilities after his contract has terminated, and he is returned to his port of shipment or discharge, or has been furnished with means to do so.

A reference must be ordered to have an account stated upon the principles of this decree, stating the expenses incurred by the libellant, and the amount of wages due him, the credits to which the claimants are entitled, and the balance, if any, due the libellant.¹

*Decree accordingly.**

THE JOSEPHINE.

A motion to dismiss an appeal taken from a decree in the District Court to the Circuit Court, must be made in the Circuit Court.

The authority of the District Court, in cases pending on appeal, extends only to the protection of parties against unreasonable delay.

THIS was a libel *in rem*, by Joseph Smith and others, against the brig Josephine.

The final decree in the cause, which was in favor of the

¹ The report of the commissioner, filed pursuant to this decree, found that no balance was due to the libellant. On the confirmation of this report, the claimants moved, that the libel be dismissed with costs. The libellant objected to the allowance of costs, upon the ground that the main point in controversy was novel, and that the decision against his claim turned upon a point of law and not on the merits. The Court concurred in this view, and denied costs against the libellant.

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claimants, was rendered March 8, 1847. An appeal from this decree was taken in due time by the libellants.

The claimants now moved that they be discharged from their stipulations given on the appeal, and that the appeal be dismissed. In support of this motion they produced the certificate of the clerk of the Circuit Court, that the notice of appeal and affidavit of service, with the papers required to be returned with the appeal, had not been filed in the Circuit Court, as late as February 3, 1849.

Mr. Bliss, for the motion.

E. C. Benedict, opposed.

BETTS, J. The application for relief in this matter must be addressed to the Circuit Court; as the question relates to the regularity and sufficiency of the proceedings to vest that Court with cognizance of the cause. That Court, and not the District Court, must determine whether the rules of the Circuit Court have been complied with, and whether the cause is to remain with that tribunal or to be dismissed from it.

The authority of the District Court in appealable cases extends only to the protection of suitors against unreasonable delays therein. Ten days after notice of the decree is allowed to the failing party to appeal. *Dist. Ct. Rules*, 152. If he omits to enter an appeal within that time, the successful party may proceed and execute the decree rendered in his favor. *Dist. Ct. Rules*, 153. So, if after regularly entering the notice of appeal, the appellant neglects for thirty days to have the proceedings transcribed in order to be transmitted to the Circuit Court, the decree may be executed in the Court below. *Dist. Ct. Rules*, 155:

It is not charged that either of these steps have not been regularly taken; and it is only on the failure to take them that relief can be sought in this Court. The relief given by this Court in the cases indicated does not act upon the appeal itself. With that this Court has no concern. The relief

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extends no further than to allow the prevailing party to proceed upon his decree in this Court as if no movements for an appeal had been signified to the Court.

The present motion, therefore, cannot be granted in this form.

Order accordingly.

THE BUFFALO.

Three causes brought, on the same facts, by different libellants, being at issue, it was stipulated that two should abide the decision of the third. Before the third was brought to hearing, the libellant died ; and his administratrix continued the cause. A decree was rendered in favor of the claimants ; but *without costs*, for the reason that the action was prosecuted by an administratrix.

Held, that in the other causes, the claimants were entitled to decrees dismissing the libels, *with costs*.

THREE libels *in rem* were filed against the steamboat Buffalo, to recover damages sustained through a collision between that boat and the schooner Mary, resulting in the total loss of the latter, with her cargo.

One of these libels was filed by Hugh Crawford, owner of the schooner, to recover for her loss. The second was filed by Eli Kellum, master of the schooner, to recover for loss of freight, clothing, provisions, cabin furniture, &c. The third was filed by William and Anson Gray, to recover the value of a cargo of coal owned by them, and lost with the schooner.

The libels were filed July 23, 1847 ; and separate answers were put in on the 16th of August following. On the 1st of December thereafter, a stipulation was entered into between the proctors of the respective parties, by which it was agreed that the suit brought by Crawford, the owner of the schooner, should be first brought to trial ; and that the decision of the other two causes should depend upon the event of that, except as to the amount of damages.

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Crawford died before the hearing in his cause ; but the suit was continued by his administratrix, and brought to final hearing on pleadings, proofs, and arguments; and on January 2, 1849, a decree was rendered dismissing the libel without costs to either party.

In the opinion pronounced by the Court, it was declared that the allegations of the libel, charging fault upon the steamboat, were disproved ; but the Court stated that in the exercise of its discretion as to costs, they would not be charged upon the libellant, the action being then prosecuted in the name of an administratrix.

The claimants now moved for an order that they have leave to enter a decree *for costs* against the libellants in the other two causes. This was opposed, on the ground that under the stipulation of December 1, 1847, the same decree must be entered in each of the other writs as was entered in that of Crawford.

Albert Matthews, for the motion.

Edwin Burr, opposed.

BETTS, J. As a general rule, costs in Admiralty follow the event of the cause. The rule is only deviated from under equitable considerations presenting a reasonable ground for exempting the unsuccessful party from its operation.

In the case before the Court, the circumstance that the libellant acted in a representative capacity, and was not pursuing a personal interest, was regarded as raising an equity in her favor to be relieved from costs. In many instances the privilege of exemption from costs is secured to executors and administrators, and in chancery it is the usual course to discharge them of costs, when they act *bonâ fide* and upon fair color of right ; although the Court, in the exercise of its general jurisdiction, may impose costs on the estate represented.

Admiralty Courts do not look beyond the actors in the cause ; and as they cannot decree costs to be paid out of the

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estate in behalf of which an administrator sues, it may be at least questionable whether they can shape their process so as to reach the assets of such estate by a decree against the representative. These considerations might induce the Court to withhold an award of costs against an administrator, when on the merits of the case the opposite party would be entitled to them.

So in respect to these very parties; the merits of their respective cases may rest upon a common right, yet there be great diversity as to their title to costs. The conduct of the owner in discarding fair offers for settlement, or otherwise, might deprive him of his equity to costs in the case, when the decree was in his favor on the merits in litigation.

I think, therefore, that the stipulation is not to be construed as relating to the costs of suit; but that "the decision of the cause," by which the parties are bound to abide, is the determination of the contested questions involved in the issue.

I therefore hold, that in the two causes now brought before the Court, the claimants are entitled to have decrees entered, dismissing the libels, with costs to be taxed.

Order accordingly.

A RAFT OF SPARS.

The rescuing a raft of timber found adrift in harbor, and floating out to sea unaccompanied by any person, is in its nature a maritime salvage service, for which salvage compensation may be awarded.

The law governing such cases in England,—considered.

The considerations which should govern the Court in adjusting the amount of salvage compensation, and its distribution amongst the salvors, in case of timber found adrift and rescued,—stated.

THIS was a libel *in rem*, filed by John S. Keteltas, with whom other libellants were afterwards joined on petition, against a certain Raft of Spars, to recover compensation for salvage service.

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The cause was brought before the Court in May, 1848, on a motion to set aside the action or stay proceedings in it, until a replevin suit which had been commenced in the Supreme Court of the State of New York, by the owner of the timber against the libellants, who claimed to hold it by virtue of a lien for their salvage, should be determined. The decision of the Court denying that motion is reported, *ante*, 291. The cause now came up for final hearing. The grounds of the libellants claim are fully stated in the opinion of the Court.

BETTS, J. The libellants claim a salvage reward for arresting a raft of sixteen spars, which they found afloat below the Narrows, and towing it ashore and securing and watching it there, until it was removed by the claimants.

On the night of the 7th of April last, the spars floated out of a basin on the East River, in this harbor, where they had been kept by the claimants, and at daybreak the next morning were discovered by the libellants, drifting to sea on a strong ebb tide, about a half a mile from the shore. Evidence was given by the claimants tending to show that the spars must have been tortiously abstracted from the basin; but if the fact was so, there is no proof connecting the libellants with the commission of any improper act, or the knowledge of it in respect to the spars. They were eleven or twelve miles below the city, out in boats opposite their residence engaged with their fishing-nets, when the raft was discovered floating past them.

The spars were, at the time, secured together by a chain passing through staples driven into the end of each log, and unaccompanied by any person. The whole body was drifting off to sea at the rate of two to three and a half knots the hour.

It was proved, that at that period of the year little or no flood tide makes up the channel below the Narrows; so that

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it must be nearly hopeless that the raft would be floated back into the harbor or its coasts by a return tide.

One of the libellants rowed off in his boat alone to the raft, fastened a line to it, and towed or turned it within his fishing hedges or poles, so as to stay or check its progress to sea; and then two other boats put off successively with two of the libellants in each, to his assistance, and the five persons, by aid of the three boats and an anchor, succeeded in towing and warping the raft to the beach and making it fast there. They were occupied in this business from daylight to between seven and eight o'clock in the morning,—a period of about two or three hours.

It is contended, 1. That no case is made out by the libellants which falls within the jurisdiction of the Court.

2. That at most, the transaction was mere towage, and not one of a salvage character.¹

In my opinion, the relief given on the occasion was in its nature maritime salvage, and accordingly the claim for remuneration may be pursued by the libellants in this Court.

The English Admiralty clearly admit the principle that services of this description are of a salvage quality; but it is held that maritime courts cannot take cognizance of the case when the service is rendered within the body of a county, the jurisdiction then appertaining to the courts of law; and the Admiralty Court would be subject to interdiction if it attempted to entertain a salvage claim for such service. .

Nor was that impediment to the jurisdiction of the Court removed or so enlarged by the act of 3 & 4 Vict. c. 65, § 6, as to embrace a case like the present, because the provision of the act is limited "to any ship or sea-going vessel." *Raft of Timber*, 2 *W. Rob.* 251.

¹ That towage may be a salvage service when rendered under circumstances of difficulty or danger, &c., see *The H. B. Foster*, *ante*, 222.

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The last decision was rendered previous to the passage of the act of 9 & 10 Vict. c. 99, § 40, which gives the Admiralty jurisdiction in salvage, for services performed, "whether in the case of ships, goods, or other articles found at sea or cast ashore;" and the provisions of the latter act, carry the jurisdiction of the English Admiralty no further than its accustomed exercise in the United States. *Waring v. Clark*, 5 *How.* 441; *The Wave*,¹ (*MSS.*) 1849.

In the present case, the raft was adrift on tide-waters, rapidly floating out to sea, and its rescue was clearly an act of salvage service.

The Court has, on a former occasion, expressed the opinion that the institution of an action of replevin by the claimants, did not affect the jurisdiction of this Court,² and that those proceedings were not of a character to afford the libellants a ready and full recompense, so as to render it equitable that they should be restrained to their remedy in the court of law under that proceeding.

The service rendered by the libellants, although opportune and valuable to the claimants, was not in itself one of hazard, or characterized by any features of extraordinary merit.

One man in a boat met the raft coming down on the tide, and was enabled alone to turn its direction and bring it within the check of his fishing stakes, and then, by aid of two other small boats, to tow it to the beach. The distance it was so carried was only about half a mile, and only about three hours' time was occupied in that service. If the raft had been reclaimed at that stage of the transaction, it is manifest a slight compensation would have covered all that could have been justly demanded.

The shore at that place is exposed to the sea surf, and it became necessary for the preservation of the raft, to separate

¹ Since reported, 1 *Blatchf. & H.* 235.

² *A Raft of Spars*, *ante*, 291.

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the logs and get them on to the beach, and so secure them with stakes and lines as to protect them from being washed off by the surge and tide. To accomplish this, the day was spent by five men, most of the time in the water, and they were afterwards compelled to keep a watch over the timber at high tide, to guard against its being swept away. This service continued for four or five days, but was no way hazardous or laborious.

The libellants took the earliest measure to have notice published in a city paper, of the rescue of the raft and its situation. In every thing within their power to do, their conduct appears to have been upright, correct, and prompt.

When the raft was discovered by the claimants, the highest compensation intimated by them for the services of the salvors was the sum of \$30, and that implied offer was accompanied by insulting and discrediting suggestions, respecting the manner the libellants came in possession of the raft; and was followed by an arrest of the timber on a writ of replevin.

The spars were estimated to be worth from \$600 to \$800, and from the state of the weather and the season of the year, there is reasonable ground to believe they might have been reclaimed by the claimants without the interposition of the libellants.

This, however, must be merely conjectural, and if it had so turned out, there must, most probably, have been considerable delay and augmentation of expense in effecting their recovery.

The persons sent out in pursuit of the raft, arrived at the Narrows at about 10 A. M., five hours after it had been secured by the libellants, about a mile below that place. If it continued moving on the tide at the rate of two and a half miles the hour, it would, at ten o'clock, have been fourteen miles out at sea below the Narrows. It is hardly supposable that the raft, at that distance, would have been discernible by persons in pursuit of it, nor, if tidings were obtained of its

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direction, but that considerable expense must have been incurred in getting it back.

I do not consider the situation of the raft to have been desperate, nor but there was a reasonable chance of its being thrown back upon Coney Island or Staten Island by a flood tide; for although the evidence shows that the ebb tide or current chiefly prevailed at that season, yet it is proved by the claimants, that the raft four or five days afterwards, was floated back to the city with great ease, upon the flood tide.

Under the circumstances, the libellants are, in my opinion, entitled to a compensation beyond what was proposed by the claimants, but not an extraordinary one, amounting in any degree to what was demanded by their counsel, to the one half or one third of the value of the timber, or even \$100, the sum suggested by the libellants before suit brought.

I shall award them the sum of \$50, with costs, considering that a reasonable compensation for the actual service performed by the libellants. As four of the libellants were hired men in the employment of Keteltas, and as the whole business was under his direction and at his expense, \$30 of the amount is to be paid to him, and \$5 to each of the other libellants.

Decree accordingly.

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To impart a maritime character to personal services rendered in or upon a vessel, they must be connected with the reparation or betterment of the vessel, or be rendered in aid of her navigation directly by labor on the vessel, or in sustenance and relief of those who conduct her operations at sea.¹

¹ Compare the somewhat analogous definition of a maritime service given in *Cox v. Murray*, ante, 340, where it was decided that a libel could not be maintained for a breach of contract for services.

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A person employed to visit a vessel at anchor, from time to time, to see to her safety, ventilate her, try her pumps and the like, cannot maintain a suit in Admiralty to recover his compensation for such services.

But if, in the course of such employment, a necessity arises that such keeper should get the ship under way, and navigate her from one anchorage to another, this is a maritime service for which libellant may recover in a Court of Admiralty.

THIS was a libel *in personam* by Jacob Gurney against William Crockett, to recover wages earned by the libellant as ship-keeper.

The respondent, master of the schooner *Excelsior*, employed the libellant to unload her, as stevedore, on her arrival from Tampico. It appeared that the libellant was afterwards employed to watch and take care of the vessel during the temporary absence of the master from town. The agreement on the part of the libellant was, that he should have the schooner anchored at a proper place, with a sufficient length of chain payed out for her safety, and should visit her and see that she remained in good condition, and secure from harm, but that he need not remain on board at night. During the master's absence, and while the vessel was in charge of the libellant, she was moved from her anchorage, by advice of the resident physician, and moored some hundred yards from the shore. The libellant afterwards went out to her frequently, nearly every day, in his own boat or that of the schooner, and occasionally opened her hatches to air her, and pumped her out. The libellant's claim was chiefly contested on the ground that the Court had not jurisdiction of such a demand.

J. B. Purroy, for the libellant.

E. C. Benedict, for the respondent.

BETTS, J. Assuming the demand of the libellant to be well founded, he has, in my judgment, no remedy for it in a Court of Admiralty.

The line of discrimination between cases which are maritime in their nature and those not so, is exceedingly dim and

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vague; and in the contested state of Admiralty jurisdiction in respect to these border subjects, it is most desirable to keep within the limits of the clear powers of the Court.

Manifestly not every contract in relation to maritime matters falls within the cognizance of maritime courts; and without attempting to define with strictness the terms within which the jurisdiction of Admiralty Courts is circumscribed, it may be safely asserted, that to impart a maritime character to a subject relating to personal services in vessels, it must be connected with the reparation or betterment of the vessel, or be rendered in aid of her navigation, directly by labor on the vessel, or in sustenance and relief of those conducting her operations at sea.

Under this general description, services are compensated as maritime which are not necessarily performed by mariners, or which may not in any way contribute to the benefit of a vessel in a nautical sense. Such are those of a cabin-boy, steward, chambermaid, and surgeon, on a voyage. These instances, however, carry the rule to its farthest extension, and are embraced within it because the services are performed mainly at sea, and have an immediate tendency to the preservation of the ship by promoting the health and efficiency of the ship's company. 2 *Dods*. 100; *Bee*, 424; 3 *Hagg. Adm. R.* 376; *Ware*, 83; *Pet. Adm. R.* 266; 1 *Sumn.* 168; *Ib.* 384; *Gilp.* 514. The case of engineers and firemen of steamships may appropriately be ranged under the head of maritime service, as their employment is necessary to the propulsion and navigation of the vessel.

When we recede from these classes to those of a more obscure claim to a maritime character, and even to such as can only be brought under the cognizance of the Court by adopting the most enlarged interpretation of its powers, it would seem advisable for the subordinate tribunals, particularly in cases not subject to review, to confine their action within well authenticated limits.

A ship-keeper is ordinarily nothing more than a watchman having guard of a vessel anchored in harbor, or lying at a wharf or in a dock. In the present instance, the libellant did not remain on board by night or by day. His duty was to repair occasionally to the schooner, at her anchorage, to see to her safety, open her doors and hatches for ventilation, and to try her pump.

I advert to his casual resort to the vessel, not for the purpose of suggesting a distinction between this case and that of a keeper stationed on board, but to mark the description of services connected with his employment, and to ascertain whether they have the characteristics of maritime. Evidently these duties are in no respect nautical. They can be fully as well performed by shore laborers as by seamen; and the libellant, in this instance, it appears, was a common stevedore.

The services are distinct from the navigation of the vessel, ceasing when that commences; and have the same character and importance on board a hulk under keeping to be broken up or destroyed, as upon a vessel preparing or intended for sea. Sweeping and scrubbing the decks, throwing out and securing lines for her fastening, or keeping watch on the wharf against robbery, fire, or other injuries that might reach a vessel from the shore, are services rendered towards her preservation of like nature with those of ordinary keepers. No principle ever yet announced seems, however, to range services of that description under Admiralty jurisdiction.

In the case of *The New Jersey Steam Navigation Company v. The Merchants' Bank*, (6 *How.* 344,) the inquiry and discussion as to the just character and extent of the Admiralty jurisdiction, was very largely pressed by counsel, and the different members of the Court who delivered opinions. The suit in that case was instituted upon a contract of

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affreightment, for the purpose of recovering a large amount of specie lost in the *Lexington*, one of the steamers of the respondents, running between New York and Providence, which was consumed by fire on the night of January 13, 1840, on Long Island Sound, about fifty miles from the former city, and probably without the jurisdiction of any State or county. The libel was dismissed by the District Court *pro formâ*, and a decree entered accordingly. On appeal to the Circuit Court, this decree of dismissal was reversed, and a decree entered for the libellants.

Upon the review of the case before the Supreme Court, it is manifest that a strong portion of that high tribunal are disposed to restrain the Admiralty jurisdiction within boundaries quite as narrow as the common-law courts in England have ever demanded ; and the judgment of the Court in that case, affirming the decree for the libellants, after renewed argument, seems to have been obtained only on the consideration that it was in character a case of tort at sea.

The result of the reasonings of the several Judges demonstrates that the positions taken in the opinion delivering the judgment of the Court were not sanctioned by a majority of the members concurring in the result. Two of the Judges who declined assenting to the authority of the Court over the subject as a matter of maritime contract, held, that cognizance could be taken of it as a tort, and on that ground united in supporting the decree.

So far as contract and service can characterize a subject and bring it under the jurisdiction of Admiralty Courts, those particulars are certainly not of less force in an undertaking for transportation of goods upon the high seas and the actual attempt to execute the agreement, than in one to act as keeper to a vessel lying in port.

In my view of this claim, it is for mere labor, not for the reparation or fitment of the vessel, and in no respect maritime,

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as being nautical in its character, or distinguishable from ordinary services rendered in going to and from a vessel, or incidental to her probable employment at sea. I shall therefore disallow the claim entirely in this action.

It appears upon the testimony, that during the period the libellant was keeper of the vessel, he was directed by the health officer to move her from her anchorage farther out into the bay. He was compelled to get her under way and navigate her to the designated place. This was comparatively a small service, but it was in its nature maritime, and the libellant had a right to resort to this Court to receive a proper compensation for it. As his remedy might have been equally perfect in a local court, costs would be denied him, but that the respondent has evinced a disposition to contest unreasonably and unnecessarily this demand, fair and just in itself. Had he proffered a reasonable reward for that service, no costs would have been adjudged against him. On the facts before me, I shall decree the libellant two dollars for that service, and summary costs, and dismiss the libel for the residue of the demand.

Decree accordingly.

PROCEEDS OF PRIZES OF WAR.

Original proceedings taken in a Court of Admiralty against vessels captured in war by a public vessel, to divest the former ownership and to confiscate the captured property, should be taken in the name of the government under whose authority the capture was made, and not in the names of the individual captors, unless express authority is given to the latter to sue in their own names.

But where the *proceeds* of prizes have been brought into Court, the parties entitled to distributive shares therein may file their libel in their individual names.

Where the United States District Attorney authorizes a suit for the condemnation of a prize to be filed in the names of the individual captors, the Court will allow the proceedings to be so conducted, instead of requiring that the suit be instituted on behalf of the government.

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THIS was a libel *in rem*, filed by the commandant of the U. S. brig of war Vesuvius, against the proceeds of certain Mexican vessels captured by the libellant's vessel during the late war with Mexico, to obtain distribution of the same.

The facts are sufficiently stated in the opinion of the Court.

BETTS, J. The libellant, commandant of the United States brig of war Vesuvius, files a libel in the nature of a notification in Court, that during the late war between the United States and Mexico, whilst in command of said brig, and on the high seas and waters leading to the sea, he had captured as lawful prize of war the Mexican vessels or "bungos," with their cargoes, called the *Bella India*, the *Francisca*, the *Joren*, the *Margarita*, and the *Julio*. That the said vessels were taken into Laguna, a place then in possession of the naval forces of the United States, under the command of the libellant. That the vessels and cargoes were unseaworthy and perishable, and that no access could be had with them to any competent civil tribunal for prosecution and condemnation as prize of war, and that the same were accordingly sold at public auction by the libellant, conformably to the requisitions of the existing war-tariff of the United States, and that the proceeds of said property are now brought by him within the jurisdiction of this Court, and prays the usual monition.

The Court ordered a monition to issue, and the appointment of a prize commissioner, with directions to receive the funds representing the captured property, and deposit the same in the deposit bank of the Court, subject to the order and decree of the Court, and that he proceed to take testimony in the cause conformably with the standing rules of Court.

The commissioner has filed his report in the premises, together with the testimony taken by him.

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The evidence fully supports the allegations of the libel. It is moreover shown, that the brig was of superior force to the Mexican vessels, and that Commodore Perry was flag officer, in chief command of the United States naval forces off that station.

The proceedings and proofs are such as, if the captured property had been brought before this Court, would require its condemnation as prize of war.

Does the anomalous manner in which the case comes up vary the principle or interfere with the exercise of prize jurisdiction by this Court?

The captures were made during the latter part of 1847. It is not necessary to detail the circumstances connected with the case of each particular vessel; they and their cargoes were sold at public auction at Laguna, under the direction of the properly constituted officers of the United States at that place, and the proceeds arrived in this port in January, 1849, when this libel was filed. If this proceeding is to be regarded as the original one to divest the Mexican ownership and confiscate the captured property, the action should have been in the name of the United States. When the capture is by a public vessel, the government sues in its own name and by its proper officer for condemnation, (*The Eole*, 6 *Rob.* 220; *Betts's Pr.* 73; *The Palmyra*, 12 *Wheat.* 1; *The Pizarro*, 2 *Ib.* 227,) unless express authority is given the commandant of the ship to sue in his own name, and for the benefit of the owner, the State being the real proprietor of property so captured. *French Guiana*, 2 *Dods.* 162; 2 *Browne's Civ. & Adm. L.* 262-264.

But there may be a distinction in respect to the *proceeds* of a prize. The parties entitled to a distributive share of it may file their libel and attach such proceeds in their individual names, when no formal adjudication has been had in the matter, or compel the captors to proceed to condemnation of

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the proceeds. *Genoa Ships*, 4 *Rob.* 317. And in the English Admiralty it would seem that although the king's proctor conducts the suit in matters of prize, in the case of public and private ships it is in the name of the captors and on their petition, (2 *Browne's Civ. & Adm. L.* 444, 448; Capture of *Chinsurah*, 1 *Acton's Prize Causes*, 179,) and the condemnation may still be made to the crown, and not to the immediate captors. *Genoa Ships*, 4 *Rob.* 329.

It is clear, upon general principles, that the captors of property lawfully prize of war, should have a participation in its value, unless they lose their privilege by misconduct; and when the thing captured is, itself, from the necessity of the case disposed of, and something else, money or goods, substituted for it, that the right of the captors should attach to that which represents the thing captured.

This doctrine is recognized in the strongest terms in English adjudications of high character. *Genoa Ships*, 4 *Rob.* 317; *French Guiana*, 2 *Dods.* 162; *The Eole*, 6 *Rob.* 224.

Sir William Scott admits, that in case of capture in a distant part of the world of property perishing, it may justifiably be converted into other property, and that the Court will have jurisdiction over *such proceeds*, the property still continuing prize. *The Eole*, 6 *Rob.* 224, 225.

If the proceeds in Court, and claimed by this suit, are to be regarded as the prize itself, yet to be adjudicated upon, the course of practice of the American courts would, as before shown, require the libel to be filed in the name of the United States, unless authority is given to the captors to proceed in their own name.

I think such authority is clearly to be implied in this case. The Secretary of the Navy, it appears, directed the libellant to bring the property into this port, and obtain the adjudication of the proper Court upon his rights and those of his crew: This unquestionably might have been effected through a libel

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filed by the district attorney in the name of the United States; but it seems, that the suit was instituted in the name of the captors with the knowledge and concurrence of the district attorney, and having been brought in such form, it must, under the circumstances, be deemed to have been brought with the assent and approval of the government.

Without considering, then, the question whether this action could be maintained technically against the proceeds until a formal adjudication of prize had been made, I see no obstacle in the way of allowing it to be conducted, as instituted, under the facts and circumstances accompanying this case.

I accordingly pronounce the captured property lawful prize of war, and that it be condemned as such; and that one half the net proceeds in Court, after payment of costs, be paid into the Treasury of the United States, and the other moiety be distributed amongst the captors, conformably to the report of the commissioner of prize.

THE ANN D. RICHARDSON.

As between the owner of the cargo and the ship-owner, the delivery of the cargo at the port of destination is a condition precedent to the right to freight; and without such delivery the acceptance of the cargo at an intermediate place by the owner of the cargo, is necessary to enable the ship-owner to recover either full or *pro ratâ* freight.

The master, although agent for the ship and cargo to the extent of being empowered, in a case of extreme urgency, to sell either or both, is not authorized to accept the cargo on behalf of its owner short of the port of delivery.

The laying claim to the proceeds of a sale of a cargo made by the master at an intermediate port, or the bringing suit for such proceeds, does not amount, in law, to a voluntary acceptance of the cargo, or to a ratification of the act of the master in breaking up the voyage.

Where a vessel puts in at an intermediate port in distress, and it is there found that a portion of the cargo has been rendered worthless by perils of the sea, while the residue is not of sufficient value to warrant continuing the voyage, and such portion is therefore sold by the master and the voyage broken up, no claim for

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freight, either in full or *pro ratâ*, or upon a *quantum meruit*, can be maintained by the ship-owner against the shipper.

Upon what principles the general average should be adjusted in such a case, as respects the contribution due from the cargo.

THIS was a libel *in rem*, by Robert Taylor against the bark Ann D. Richardson, to recover the proceeds of a sale of goods shipped on board the bark by the libellant.

The facts are stated in the opinion of the Court.

Francis B. Cutting, for the libellant.

Daniel Lord, for the claimants.

BETTS, J. The facts upon which the points in contestation in this cause arise, are these: The libellant shipped at Philadelphia, on March 18, 1847, on board the bark Ann D. Richardson, for Londonderry, a cargo consisting of wheat flour, Indian meal, corn, and navy bread, for which the usual bills of lading were executed by the master, engaging to deliver the cargo to the consignees in the bill of lading named, they paying stipulated freight therefor.

The vessel sailed the next day on her voyage. She was new and stanch, but before leaving sight of the Capes made water at the rate of one hundred strokes the hour.

It appears, however, upon the evidence, that she was fully seaworthy when she sailed, and that the amount of leakage she exhibited was usual in new vessels, and did not affect the cargo or her seaworthiness.

On the 27th of March she encountered a heavy gale from the S. E., which continued to the 30th, and then increased to extreme violence. The bark was thrown on her beam ends, her masts were cut away, and she lay water-logged.

The crew, with great labor, freed her of water, and rigged spars and endeavored to work the vessel to Bermuda, but being unable to make that port, they put into St. Thomas, on the 23d of April, as a port of necessity.

A survey was there held of the cargo. A portion of the

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corn, (557 bushels,) was found in a putrefying state, and was thrown overboard as valueless. The chief part of the residue of the cargo had been wet and damaged by the stress of weather to such a degree that it could not safely be transported to the port of destination, and the master was advised by the surveyors to sell the whole cargo remaining, that not injured not being deemed of value to justify carrying it to Londonderry. It was accordingly sold on the 11th of May, at auction, for \$7,730.02.

The claimants allege this sum is subject to an average charge of \$582.08 ; and they also contend that the vessel is entitled to full freight and primage for the whole voyage, amounting to \$4,562.26, and the balance, \$1,712.85, they are willing to pay over to the libellant. They deny their liability for any thing beyond that sum.

The vessel was repaired at St. Thomas and ready to receive a cargo and prosecute her voyage, by the 2d of June. She did not offer to proceed to Londonderry with the sound portion of the cargo, nor did she provide any other vessel in her place. She was employed on a different service. The libellant was not present in person or by any authorized agent at St. Thomas, and was no way consulted in the disposition of the cargo and breaking up the voyage.

Three questions were discussed upon these facts :

1. Whether the owner of the vessel was entitled to full or *pro rata* freight, or any freight for the transportation of the cargo to St. Thomas.
2. Whether he was justified in selling the cargo and breaking up the voyage at the latter port.
3. What average the cargo of the libellant was legally liable to pay.

In arguing the case, the counsel have examined minutely the doctrines obtaining in the English and American courts, and it is strenuously contended for the ship-owner that upon the well-recognized principles of American law, full freight

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was earned in this case, and that the acts of the master, under the emergency, must be regarded as the acts of the libellant, by which the vessel was deprived of her cargo, and prevented completing the voyage undertaken.

If this position is not sanctioned by the Court, it is urged that the libellant, by demanding the proceeds of the cargo and bringing suit to recover them, adopts and confirms the sale made by the master.

It is not to be controverted that the English rule, applicable to a voyage so circumstanced, debars the ship-owner of all claim to freight.

The case of *Vlierboom v. Chapman*, (13 *Mees. & W.* 230,) presents a statement of facts covering all the essential features of this case. A cargo of rice was shipped at Batavia for Rotterdam, by the bill of lading to be delivered there on payment of a stipulated freight. The ship encountered a severe hurricane, and it became necessary to throw part of the cargo overboard and to take the vessel, in a damaged state, to the Mauritius. The cargo was there examined, and it was found necessary, without delay, to sell the whole, otherwise it would become utterly worthless from the progress of rapid putrefaction. The rice was sold at Mauritius by agents, to whom the master, acting *bonâ fide*, confided the ship and cargo; and the proceeds were remitted to the ship-owners. The plaintiff, (owner of the cargo,) had no agent at Mauritius, and neither of the parties was present at any part of the transaction, nor had any knowledge thereof until after the sale of the cargo.

Thus far the two cases are brought under the same range of facts. The English suit, however, seems to have been an amicable one, as the defendants did not retain freight money, nor set up an absolute charge for it.

The question submitted to the Court was, whether the defendants had any lien or right of deduction or set-off against the proceeds of the rice, either for the freight in the bill of lad-

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ing, or for, *pro ratâ* freight, or for any freight on a *quantum meruit*.

The plaintiffs' point was, that under the above circumstances, the defendants were entitled to no set-off for freight.

The defendants' point was, that they had a set-off or lien, for freight, to the extent of £1,413.0.4, the produce of the sale, or, at all events, to some extent.

The Court decided, that if the master might be regarded the agent of the owners *ex necessitate*, so as to validate the sale, he was not such agent with a right to accept for them a delivery of the cargo at Mauritius, in place of Rotterdam, and that the plaintiffs not having transported the cargo conformably to their contract, were not entitled to full freight, nor to *pro ratâ* freight, as for a part performance accepted in lieu of a full one.

It was also decided, that there was no foundation for a *quantum meruit* claim or allowance of freight.

The Court grounded their reasoning and decision very much upon some American cases, cited by Judge Story, in his edition of Abbott on Shipping, (p. 328.)

The argument for the defendant in this case now is, that the doctrine of the American decisions was misapprehended, and that the rule to be deduced from them is, that the ship-owner, under like circumstances, is entitled to full freight, or at least to *pro ratâ* freight.

In the case of *Miston v. Lord*,¹ decided in the United States Circuit Court for this district, in September, 1848, the doctrines of the case of *Vlierboom v. Chapman*, were recognized in so far as the authority of the master to sell cargo under similar circumstances was involved. As between owners and underwriters, he may, on general authority, have an implied power to do what is fit and right to be done, with ship or cargo, in case of emergency. *Park. Ins.* ed. 1842, 345.

¹ Since reported, 1 *Blatchf. C. C. R.* 354.

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But the Court regarded it a fundamental principle of the contract of affreightment, that as between the owner of cargo and ship-owner, no right to freight accrued except upon performance of the contract by the ship, unless the terms of the contract were dispensed with by the owner of the cargo; although such discharge need not be by express agreement, but might be implied or inferred from his acts.

This is believed to be the rule of maritime law adopted and enforced in the European and American courts. *Pothier Traité du Contrat de Louage*, No. 59; *Boulay Paty*, tit. 5, sec. 16; *Pardessus*, Part 4, tit. 14, ch. 2, No. 718; *Abbott on Shipp.* 492, note 1; *Vlierboom v. Chapman*, 13 *Mees. & W.* 239; 3 *Kent*, 6th ed. 218; *Hartin v. The Union Insurance Company*, 1 *Wash. C. C. R.* 530.

The delivery of the cargo at the port of destination is considered a condition precedent to the right to freight, and without that, the acceptance of the cargo at an intermediate place, by the owner of it, is necessary to enable the ship-owner to maintain a claim to full, or *pro ratâ* freight. *Caza v. The Baltimore Insurance Company*, 7 *Cranch*, 358; 3 *Kent*, 228, 229, note *a*; *Abbott on Shipp.* 534, note 1; *The Nathaniel Hooper*, 3 *Sumn.* 542. The case of *The Nathaniel Hooper* demonstrates that the rule in Admiralty is in consonance with that at common law on the subject. 3 *Sumn.* 555. The case is not affected by the later decision in *Jordan v. The Warren Insurance Company*, (1 *Story*, 342,) for there a voluntary acceptance of the cargo by its owner was made; but a claim to the proceeds of sale, or bringing suit therefor, does not amount in law to a voluntary acceptance of the cargo, or to a ratification of the act of the master in breaking up the voyage; nor is the master, though agent for the ship and cargo to the extent of being empowered in a case of extreme urgency to sell either or both, *ex officio* an agent of the ship, authorized to accept the cargo short of the port of delivery and break up the voyage. *Miston v. Lord*, Circuit Court, 1848.

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The points in the case now under consideration, not involved in the decision in *Miston v. Lord*, or in *Vlierboom v. Chapman*, are, that a portion of the cargo on the arrival of the vessel at St. Thomas was sound and in a condition to be transported to the port of destination, but was sold by the master together with that which was injured and perishing, and that the vessel was repaired within a reasonable time at St. Thomas, and placed in a condition to perform her voyage, but did not offer to complete it.

Most unquestionably the master was not bound to take on board and attempt to carry forward, the putrid and worthless portion of the cargo, nor was it his duty to receive that which had been so injured as to be liable to putrefaction, or to occasion disease or discomfort to her ship's company, or injury to the sound cargo in its transportation.

Those principles are stated and enforced with earnest perspicuity in the two American cases before cited. *Jordan v. Warren Insurance Company*, 1 *Story*, 352, 353; *Miston v. Lord*, Circuit Court, 1848. When the whole cargo is so damaged that it cannot be transported without endangering the safety of the ship or crew, or cannot, from its perishing state, be probably so preserved as to endure transportation at all, the ship need not proceed with it, or offer to do so; but the remedy of the ship-owner is on his policy for freight, he having failed to earn it, by means of perils insured against or insurable. 1 *Phill. Ins.* 290.

The loss of the cargo must, however, be total, for although damaged to such a degree as to be not worth the freight at the port of destination, this does not amount to that kind of total loss, which authorizes a recovery of the freight on a policy. *Herbert v. Hallett*, 3 *Johns. Cas.* 93; *Griswold v. The New York Insurance Company*, 1 *ib.* 205.

. The present action seems framed upon the notion that if the ship-owner, on the facts, would have a right to recover

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freight on a policy of insurance, he has the same remedy against the owner of the cargo.

That is clearly not the law. Considering the condition of the cargo on the arrival of the vessel at St. Thomas, as equivalent to a total loss or physical destruction of it, the plaintiff would be entitled, on insurance of freight, to recover his whole freight for the voyage, (1 *Phill. Ins.* 290, 427,) yet as against the shipper, he cannot recover freight except on performance of the condition of transporting the cargo and delivering it at the port of destination, conformably to the contract of affreightment.

Independent of this principle, there remained a portion of the cargo in this case, in sound condition; and to entitle the ship-owner to claim freight at all, he must have carried forward so much of the cargo as could be transported. It is no concern of his, whether by so doing the interests of the shipper would be advanced or consulted. He has nothing to do with the question of profit or loss to the shipper; and his vessel having been soon repaired and capable of performing the voyage, it was his duty to complete it, and then he would be entitled against the shipper to full freight on all the cargo delivered, in specie, whatever its condition or value; and might recover against the underwriter for that portion which perished on the voyage, which, for that reason, could not be delivered.

I shall, therefore, pronounce against the libellant on that part of his action which claims the recovery of freight in full or *pro rata*, or compensation upon a *quantum meruit*.

It is not denied by the libellant that the ship-owner is entitled to a contribution from the cargo on the general average of losses sustained by the ship. But it has been made a serious question in the cause as to the particulars of valuation and loss which shall enter into the computation and adjustment of that average.

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Counsel, on both sides, however, conceding that a re-adjustment must be made, admit that the better course now is to take general directions from the Court respecting the method of stating the average, and to wait until the adjustment is presented, before a decision is asked in detail upon the particulars proper to be included in it. The adjuster may so settle these points as not to leave it desirable to either party to litigate the matter before the Court.

In the adjustment presented to the Court, the ship is credited with full freight for the voyage. This is erroneous. No allowance is to be made on that item beyond the value of the freight on the cargo thrown overboard, and that value will be made contributable, also, in the general average. The cargo, on the question of general average, is not to be charged with any expenses incurred in respect to it, after the voyage was broken up and abandoned.

The charges for reparations made to the vessel subsequently, may properly be referred to as a means of measuring the actual value of her injuries sustained for the common benefit. That allowance has no application to claims for the care and management of the cargo after it ceased to be connected with the vessel for the purposes of the voyage. Services or expenditures of that character have no connection with the ship or the injuries she incurred for the common advantage, and cannot, therefore, be subjects of general average.

A decree, with special directions, must be entered according to the foregoing principles.¹

¹ The decree in this cause was affirmed, on appeal to the Circuit Court, October, 1849.

The Bark Laurens.

THE BARK LAURENS AND \$20,000 IN SPECIE.

The deputy-marshal is an officer of the District Court, amenable to its jurisdiction for malfeasance in office; and this jurisdiction may be exercised by summary order or attachment for contempt.

The marshal is personally answerable (under *Sup. Ct. Rules*, 41, and *Dist. Ct. Rules*, 158) for any failure to pay moneys attached by him, into Court forthwith; and the responsibility of the deputy is no less stringent than that of the marshal.

The resignation of office by an officer of the Court, does not oust the Court of jurisdiction to proceed against him by attachment for contempt for any acts of misconduct committed by him while in office.

Where specie, although consisting of foreign coin, is attached under process of the Court, the officer is bound to pay it into Court as *money*; and it is not to be considered as *cargo* merely.

Under the act of April 18, 1814, (3 *U. S. Stats.* 127,)—which directs that moneys received by officers of the United States Courts shall be deposited in bank, &c.,—the Court is authorized to require its officers to pay moneys received by them into Court, to be deposited in bank by the clerks of the Court.

THIS was a libel *in rem* filed by the United States against the bark Laurens, and \$20,000 in specie on board her, alleged to be forfeited to the United States for being employed in the slave-trade.

Former proceedings in the cause are reported, *ante*, 302.

An application was now made for an order upon Eli Moore, United States marshal for the district, that he forthwith pay into Court the sum of \$20,000 in specie, attached on board the bark Laurens, proceeded against by the United States on a charge of having been engaged in the slave-trade, and which specie, with other effects, had been taken into custody by William H. Peck and others, specially deputed by the marshal to execute the process of the Court; or that a peremptory attachment issue. A similar motion was made as to William H. Peck, the deputy, who was exclusively and directly identified with the custody and withholding of the specie.

Other facts are detailed in the opinion of the Court.

J. Prescott Hall, (U. S. District Attorney,) for the motion.

Francis B. Cutting, opposed.

BETTS, J. An order was granted by the Court on the 21st inst., on motion of the United States attorney, that the marshal of this district forthwith pay into Court the sum of money attached by him in the above-entitled cause. The hearing of the matter was deferred at the instance of the marshal until yesterday.

The order of the Court was served on William H. Peck, chief deputy of the marshal, and concurrently with the motion against the marshal, the district attorney moves for an order that the said deputy pay the aforesaid money into Court, or that an attachment issue against him.

It is objected on the part of the marshal, that no proof is made of personal service on him of the order of Court, and on the part of the deputy, that no order has been granted directing him personally to pay the money into Court.

In order to lay a foundation for a peremptory attachment, it is incumbent on the applicant to show that his preliminary proceedings have all been strictly correct. *The United States v. Caldwell*, 2 *Dall.* 333.

But the same rigor is not necessary to obtain an attachment to bring a party before the Court to answer upon matters touching a civil suit. In such cases, the first proceedings may be by order that the accused party show cause why he should not be punished for the alleged misconduct; or an attachment may be issued to bring him before the Court to answer for the misconduct, (2 *Rev. Stats.* 536, § 6,) and the practice of the State Court governs this Court when not otherwise regulated by its own specific rules. *Circuit Ct. Rules*, 102; *Dist. Ct. Rules*, 340.

The material question is, whether a proper cause is shown for the interposition of the Court against the marshal or deputy, by process of attachment in the first instance, or by an order that they show cause why an attachment for contempt of Court, because of misconduct in office, shall not issue against them. *

The Bark Laurens.

Thus far the cases of the marshal and deputy have been considered as depending upon a principle common to both.

Upon the facts brought out, however, by the depositions read in Court, it seems proper to separate them at this point, and to dispose of each case on its special circumstances.

It appears that a monition and attachment against the bark Laurens, her tackle and apparel, furniture, appurtenances, guns, and goods and effects found on board, and \$20,000 in specie, was delivered to the marshal on March 15, 1848. He deputed William H. Peck, J. S. Smith, Joseph Thompson, or either of them, to execute the process, and the same day it was served by Smith and Thompson, by the arrest of the vessel and the specie. The specie was taken by Mr. Thompson to the Mechanics' Banking Association in this city, and left there subject to the order of Eli Moore, the marshal, and as Mr. Thompson deposes, on special deposit, according to his understanding.

The deputy, Peck, states in his affidavit, that the specie attached was estimated at \$18,992, and no more; consisting of \$1,000 in silver, and several kegs of doubloons and half doubloons,—gold pieces of a foreign currency. The \$1,000 in silver were afterward by his direction placed to his credit, by the cashier, and the gold coin was sold and the proceeds also passed to his credit in the bank. He says he has disbursed a portion of these moneys for the official services of the office, and that the total sum he has received in his official capacity, including these moneys, amounts to \$133,000, or thereabouts, and that he has disbursed and expended for and on behalf of the marshal, during that period, the sum of \$126,000, or thereabouts, leaving about \$7,000 in his hands, which he states he is ready to account for and pay over to the marshal. He farther says he resigned his office of deputy marshal on the 23d inst.

The resignation was made after these proceedings were initiated and notice thereof had been served on him.

On these facts the counsel for Mr. Peck takes the following objections to the competency of the Court to enforce an order, or issue an attachment against him :—

That if the moneys in the cause came to the hands of the deputy, they were in judgment of the law received by the marshal, and the deputy is not answerable for them by summary order of the Court, nor by suit at law. That the remedy of the parties interested in the moneys must be taken against the marshal alone. That a deputy marshal is not an officer of the Court amenable to the authority of the Court by way of attachment for misconduct or malversation in his office.

That Mr. Peck is now no longer deputy marshal, and therefore in no way under the supervisory authority of the Court in respect to his transactions when in office.

A subsidiary exception is taken that the specie cannot be regarded as money in the hands of the marshal, but only as cargo in his custody for safe keeping until the final decision and disposition of the cause, and accordingly not subject to be brought into Court.

A farther point was taken under the terms of the act of Congress of March 3, 1817, that an attachment cannot be awarded for not paying the money into Court, but only on the refusal or neglect of the officer to pay it into an incorporated bank of the State to the credit of the Court.

1. The main defence against this proceeding was placed on the first position, that a deputy marshal is not an officer of the Court, in such a sense as to render him directly amenable to its supervision, and subject to attachment for not paying over money received by him *virtute officii*.

Whatever may be the rule at common law in respect to the direct liability of deputy sheriffs to suitors for moneys collected by process of Court, it seems to me there is no ground for question under the act of Congress of March 3, 1817, (3 U. S. Stats. 395,) that a deputy marshal is subject to the

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same summary remedy in respect to moneys held by him officially that the marshal is himself.

The United States Circuit and District Courts are directed by section 1 of the act, to cause 'all moneys, being subject to their order, to be deposited in bank; and section 2 provides that all moneys which shall be received by the officers thereof in causes pending in Court, shall be immediately deposited in bank to the name and credit of the Court; and section 4 directs that, if any clerk of such Court, or officer thereof, having received any such moneys as aforesaid, shall refuse or neglect to obey the order of such Court for depositing the same as aforesaid, such clerk or other officer shall be forthwith proceeded against by attachment for contempt. 3 *U. S. Stats.* 395. If the Court were called upon to expound the language of the statute for the first time, there would seem to be no reasonable ground for not giving it its full, plain, and natural import, and applying it to every grade of officers carrying into execution the powers of the Courts, and receiving moneys under their process or by their direction.

Chief Justice Marshall clearly considered the law as embracing deputy marshals; for in *The United States v. Man*, (2 *Brock.* 1,) he awarded an attachment against a deputy marshal to compel the payment of money into Court, collected on execution. No question was raised in that case as to the just liability of that officer to this form of procedure. This was in 1822. In 1844 the point was raised in the Sixth Circuit, and Mr. Justice McLean, on a careful consideration of the statute, decided that the deputy marshal is an officer of the Court, and subject to its power as such, and that he may be compelled by attachment to pay over money collected by him *virtute officii*. The Judge remarked that it would be disreputable to the Court and to the institutions of justice, if, in such case, the Court could not afford a summary remedy against one of its officers. In that case, too, the deputy had received a portion of the money when he had no authority to

receive it, the execution having been returned; and the Court held he was responsible for it, although the marshal was not. *Bagley v. Gates*, 3 *McLean*, 465.

If the money had come properly, in the course of his official duty, into the hands of the deputy, the marshal would immediately be liable for it. Judge McLean holds that the deputy is no less so for that cause. And it seems to be the rule in Massachusetts, not only that the sheriff is liable for the acts of his deputy done *colore officii*, but that such liability is consequent upon that of the deputy for the same acts. In *Knowlton v. Bartlett*, (1 *Pick.* 275,) a deputy sheriff attached money, after the process was *functus officio*, and embezzled it. The Court held the sheriff liable, because the act was done under color of office. The same doctrines are declared by Parsons, C. J., in *Marshall v. Hosmer*, (4 *Mass.* 63), and *Bond v. Ward*, (7 *Ib.* 127); and all the cases go upon the assumption of the personal liability of the deputy for the acts for which the sheriff was made responsible. In South Carolina the sheriff has been held liable to attachment for moneys paid a clerk in his office, embezzled by the clerk afterwards. *Abercrombie v. Marshall*, 2 *Bay*, 9; *Carter v. Ken*, *Ib.* 112.

Independent of the statute referred to, the Courts of the United States, under their inherent powers and their right to regulate their own process, possess ample authority to prescribe rules in relation to the collection and disposition of moneys obtained under their process or order, and to compel the observance of such rules by attachment. *Bac. Abr.*, tit. Attachment, A.; *Com. Dig.*, Day's ed., tit. Attachment for Contempt of Court, note 1; 3 *Durnf. & E.* 351; 2 *Rev. Stats.* 543, § 1. Such rules are prescribed by the Supreme Court and by this Court.

In my opinion the deputy marshal is an officer of this Court, amenable to its jurisdiction for malfeasance in office by summary order or attachment for contempt. The marshal

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would be personally answerable under the terms of Rule 41 of the Supreme Court, and of Rule 158 of this Court, for failing to pay moneys attached by him forthwith into Court; and the responsibility of the deputy is no less stringent. So, also, under the practice of the Supreme Court of this State, the sheriff is subject to attachment for not paying moneys collected by him on process to the party, or into Court, although no demand is made on him therefor. *Brewster v. Van Ness*, 18 *Johns.* 133.

2. It is earnestly contended that the resignation of his office by the deputy, on the 23d inst., ousts the jurisdiction of the Court over him. This is upon the assumption that the authority of the Court, by attachment, cannot be exercised over any one except he be at the time an officer of the Court. This doctrine is correct as to executory acts. The Court could have no power to compel the deputy to resume his office, or to proceed hereafter in the execution of his duties. But this principle does not touch that of the rightful authority of the Court in respect to acts and omissions of its officers while acting as officers. The power of the Court to afford a remedy against sheriffs by attachment, after they leave office, for malversation or neglect of duty in office, is one constantly exercised, and has never been questioned.

In February term, 1810, the Supreme Court of New York awarded an attachment against a late sheriff, for not returning a *fi. fa.* delivered to one of his deputies in 1797, to bring him into Court to answer on oath to interrogatories. *Brockway v. Wilbur*, 5 *Johns.* 356. He was afterwards discharged on account of laches of the party prosecuting, the process having been delivered to a deputy more than fourteen years previously. *The People v. Gilliland*, 7 *Johns.* 555. Equally direct are the cases of *Brewster v. Van Ness*, (18 *Johns.* 333,) *The People v. Brower*, (6 *Cow.* 41,) and *The People v. Evans*, (4 *Hill*, 71.) It is presumed the argument would not

be advanced, that the marshal, in this case, if the money in question came into his hands, could exempt himself from these summary proceedings by resigning his office. The deputy, as an officer of the Court, stands on the same footing. He is compellable to answer to the Court for abuse of its process, or other contempt of Court, whilst acting as its officer. The proceeding by attachment does not affect him as an officer, but individually. It is not against him in the character of one now acting in office, but to compel him to complete and carry out his official duties in doing something he had neglected and omitted, and because of malversation, whilst an officer, in retaining in his hands moneys received by him when in office, and by color of his office. The law empowers the Court to act directly upon the office of a deputy marshal, for misconduct committed by him in office, by removing him. This Court had drawn an order, in execution of that power, removing this deputy from office, when informed of his resignation; but that mode of punishment would in no way affect the civil rights and remedies of suitors against him, for embezzling their moneys collected by him, nor the power of the Court to inflict punishment by way of fine on him for such misconduct.

3. I cannot assent to the doctrine set up in the third point raised in behalf of the deputy, that this specie was merely cargo, which he is not bound to bring into Court or deposit in bank. The foreign coins mentioned in the depositions, comprising the large sum in question, were all legal currency under our laws. They were money, the same as coin of the United States Mint. By the laws of this State, the sheriff can levy on money or bank bills, and must return and pay them as so much money collected. 2 *Rev. Stats.* 290; *Allen on Sheriffs*, 159. The case of *Knowlton v. Bartlett*, (1 *Pick.* 271,) was that of money levied on and embezzled by the deputy sheriff. The process in his hands was a mesne attachment, the same in effect as the attachment and monition

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issued in this cause. There was no necessity for changing the character of the property taken. It was already money; and the officer was bound to pay it into Court as such.

4. It is contended that this proceeding is not supported by the act of Congress of 1817, as it demands the payment of the moneys into Court, whilst the statute directs that they shall be deposited in an incorporated bank of the State to the credit of the Court. This is only a different phraseology for the same act and the same result. The purport and object of the motion is to place the moneys under control of the Court for the protection of the parties litigant; and the order might be modified so as to conform to the language of the statute, if that were necessary. The act of April 18, 1814, (3 *U. S. Stats.* 127,) directed the deposit of moneys paid into Court, in an incorporated bank, to be designated by the Court. The act of March 3, 1817, (3 *U. S. Stats.* 395,) appointed the branches of the United States Bank such depositaries, still leaving it to the Courts to designate State banks when no branch of the United States Bank was convenient. On the termination of the charter of the United States Bank, this Court designated incorporated banks in this city for that purpose. The Bank of the State of New York, the Manhattan Bank, and the Bank of New York, are the only ones appointed. Section 2 of the act of 1817 requires the moneys to be deposited in the name and to the credit of the Court. The marshal may, undoubtedly, if he elects so to do, proceed directly to the appointed bank and place money collected by him in deposit in that form, provided the bank will accept it from him. But it is manifest that an orderly and accurate method of conducting this business, and keeping the accounts so that all parties in interest can acquire the information they need in respect to deposits, and so that the funds shall be emphatically in public keeping, is indispensable. The Courts in this district require, to that end, that the moneys be paid into Court, to be deposited by the clerks, under the title of the cause to which they

appertain. The Court, as such, keeps no bank account, and there is no general deposit of moneys to its credit. Every deposit is specific and special, to the credit of the cause out of which the money arises. No part of such money can be drawn out but by order of the Court, entered on the minutes, signed by the Judge, and then checked for by the clerk. Those minutes and records are open to inspection by all persons in interest. If, then, the money is, in the first instance, carried by the marshal to the bank, it will be necessary to re-deposit it under the order of the Court, in the manner provided for keeping the accounts, and for its safe and correct disbursement.

Upon the law of the case, I am clearly of the opinion that the United States attorney is entitled to compel Peck, the deputy, to pay the money in question into Court, under penalty of attachment for contempt.

There is, however, undoubtedly some want of formal steps to entitle him to a peremptory order to that effect. No order has been served personally on Peck which he has disobeyed, and he is not, accordingly, put in a state of contumacy as yet before the Court. Sufficient, however, is shown upon his own affidavit to satisfy the Court that he was apprised of the proceedings, and to justify an order or an attachment against him, to bring him before the Court to answer.

It is accordingly directed, that the United States attorney may take an order on Peck, that he forthwith pay into Court the moneys in question; or at his election he may have an attachment to bring Mr. Peck into Court to answer interrogatories on the subject-matter.

It is not made to appear upon the proofs submitted to me, that the marshal has personally been guilty of any delinquency. He is answerable for the acts of his deputy done *colore officii*, (*The People v. Dunning*, 1 *Wend.* 16; *Clute v. Goodell*, 2 *McLean*, 193,) although without his knowledge

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or recognition; (*McIntyre v. Trumbull*, 7 *Johns.* 35; *Walden v. Davidson*, 15 *Wend.* 575); and in respect to moneys so collected or taken by the deputy, the party entitled to them can have his remedy by process of attachment against the marshal personally. *The People v. Brower*, 6 *Cow.* 41.

There is some want of complete formality in this instance, as to the proofs necessary to found a motion for a peremptory attachment; and one for the purpose of bringing the marshal before the Court to answer is unnecessary, as he presents his own affidavit and that of Mr. Thompson, showing cause in excuse of himself. The excusatory matter set up will not protect him against an attachment, unless it appears that Peck obtained possession of the money tortiously and in fraud of the marshal's rights. The Court cannot, upon the statements laid before it, imply that Mr. Peck so acquired the money; and the marshal may be compelled to answer on interrogatories, whether the late deputy had not adequate powers in this behalf to take upon himself the possession and control of the money.

As the evidence of the preliminary steps does not entitle the applicant now to a peremptory attachment, and as there does not appear to have been any personal delinquency on the part of the marshal, I shall direct that an order be entered for him to pay the money into Court on or before the first day of May next, or that an attachment issue against him.

Order accordingly.

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Where a master procures a seaman to be discharged by a United States consul in a foreign port, if any deceit or collusion has been practised by the master in obtaining the discharge, he can claim no benefit or immunity under it.

When there is no evidence of improper conduct on the part of the master in obtaining a seaman's discharge by a consul, and it appears that the consul has proceeded fairly, and on clear *prima facie* proofs has ordered the seaman to be discharged for criminal conduct, such discharge itself is a bar to any continuing claim for wages which might be enforced if the seaman's connection with the vessel still subsisted.

The propriety of the consul's interference is to be determined upon the facts before him, and not by the case which may be afterwards shown upon a trial.

THIS was a libel *in personam* by Abraham Tingle against Joseph I. Tucker, master of the ship *Diadem*, to recover wages.

Four other suits were brought by other members of the crew of the *Diadem*, upon the same state of facts, and involving the same questions. The five suits were consolidated and heard as one.

The five libellants were all colored men. The libels showed that the ship was up in January, 1848, for a voyage from New York to Apalachicola, thence to one or more ports in Europe, and back to a port of discharge in the United States. Some of the libellants sailed with the vessel from New York to Apalachicola, and all of them performed the voyage from Apalachicola to Marseilles.

The libellants charged that they were ill treated on the voyage, both as to provisions and as to time and manner of work, and that on the arrival of the ship at Marseilles, they were, by order of the defendant, thrown into prison, and there detained until the ship sailed; and that they were then left by her at that place, although willing and desirous to continue on board and to perform the voyage. The libellants averred their own good conduct during the voyage, and claimed full wages to the time of the arrival of the ship at the port of New

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York, together with their expenses incurred in Marseilles, and in returning home ; the aggregate amount of their claims being \$702.

The answers denied any improper conduct on the part of the respondent towards the libellants, and alleged that the libellants had been fully paid all their earnings by advances made to them, and by expenses and disbursements which the respondent incurred by reason of the misconduct of the libellants on board the ship.

The answer then alleged that on the passage to Marseilles, the libellants were guilty of disorderly conduct, amounting to open mutiny and revolt, and which was carried to the extreme of depriving the officers of the command and control of the crew, and putting them in fear for their lives ; that on the arrival of the ship at Marseilles, the conduct of the crew was reported to the United States consul at that port, who, after taking the depositions of the officers and steward, and inquiring into the facts, ordered the libellants to be discharged from the ship, and sent to the United States for trial ; that in so doing, the consul acted on his own judgment and authority, though, as respondent believed, his own life and the ship would have been unsafe, if the libellants had remained on board. The respondent further averred, that he had no knowledge that the libellants were imprisoned at Marseilles.

On the hearing, numerous and very contradictory proofs were put in, relating to the conduct of the libellants complained of by the respondent. It did not appear, however, upon the whole, that the libellants were guilty of any extreme misconduct, or that the officers had any reasonable cause for apprehending personal danger or any intentional mutiny. It was further shown, that on the arrival of the libellants in New Orleans for trial, the proofs which were offered to the grand jury there were regarded by them as insufficient foundation for indictment. It was, however clear, that the conduct of libellants was at times perverse and offensive to the officers,

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and that they were deficient in ready subordination and alacrity in the performance of their duties.

The respondent relied upon the discharge granted by the United States consul as being conclusive on the question relative to the conduct of the libellants. The certificate of discharge was as follows :—

CONSULATE OF THE UNITED STATES, *Marseilles*.

“I, D. C. Croxall, consul of the United States at Marseilles, certify that Captain Joseph I. Tucker, master of the ship *Diadem*, of New York, personally came and appeared before me, at my office in the city of Marseilles, on the 19th day of May, A. D. 1848, and after depositing his ship's papers, declared that he had a charge to enter before me against several of the crew of the said ship, and proceeded to charge Joseph Tilman, Abraham Tingle, Henry Tingle, Joshua Boston, and David Martin, colored seamen, with having committed divers acts of premeditated violence, disobedience, abuse, and direct personal obstruction of the execution of his lawful orders on board said ship during her voyage from New York to Apalachicola, and from thence to Marseilles. That said five seamen exercised great influence over others (colored) of the crew, and caused them to join in all their bad and mutinous conduct. That his (the said captain's) life had been threatened by one if not more of said seamen, and that neither he nor his officers had any control or command over them or the men under their influence. That he, and his first officer, did not consider it proper or safe that said five men, the ringleaders, should be retained on board. That they, the said master and mate, should be afraid and unwilling to proceed again to sea with them, and therefore requested me, the said consul, to take steps to have said ringleaders removed from said ship and imprisoned, not deeming his (the said master's) person or life safe from them, and that he should produce

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proofs preparatory to the discharge of said seamen from said ship.

"I certify that after examining said master, the first officer, the cook, E. Cooper, and a seaman named Lewis, (George,) and also Mrs. Caroline Tucker, wife of the said captain, separately under oath, and finding the said master's statement confirmed by the other witnesses, I accordingly discharged said five seamen named herein, as the ringleaders in the various acts of mutiny, disobedience, abuse and revolt charged against them, from said ship, and shipped other seamen in their stead.

"Witness my hand and official seal, at Mar-
[L. s.] seilles, this 3d day of June, 1848.

(Signed,)

D. C. CROXALL,
United States Consul."

Alanson Nash, for the libellants.

E. C. Benedict, for the respondent.

I. The rule of law is clear that the captain has the right, in cases of incorrigible disobedience, mutinous and rebellious conduct, to discharge a seaman before the end of the voyage. *Ware*, 707. The law clothes him with that discretion.

II. Consuls, too, have very large discretion in such matters, even by statute. It is a mistake, however, to consider the functions and powers of consuls as mere creatures of the statutes of the United States. Consuls have certain duties, given to them by statute, but they are international ministers deriving most of their powers from the law of nations and international usages, and in all nations have always had a very extensive and beneficial jurisdiction, as well in advice as in action in all this class of cases. It is the *duty* of a master in all such cases to address himself to the consul of his nation for advice and aid, and doing so, the law will protect him when he acts in good faith.

III. In this case, every thing shows that the captain and

the consul acted deliberately and honestly in the exercise of an official discretion. That discretion was conferred upon them by the law, and it is a principle to which there is no exception, that when the law confers discretion, it protects the exercise of that discretion. If it be exercised in good faith, the act is binding, and the party that exercises it is subject to no consequences. If the innocent suffer, it is their misfortune; if the guilty escape punishment it is their good luck.

IV. The men were *lawfully discharged*; their voyage was legally ended and their wages stopped. They were *legally sent home by the consul to be tried*. That they were never tried was their good fortune, but it has no effect upon the conduct of the captain or the consul.

BETTS, J. The sufficiency of the action taken by the United States consul at Marseilles to exonerate the respondent from liability for the improper imprisonment of the libellants and for their discharge from the ship, is the main point to be considered and disposed of.

The proceedings before the consul were had at the instance of the respondent; and if any deceit or malpractice had been resorted to by him to induce the official act of the consul, he could not claim any immunity or benefit under that act. There is nothing in the case, however, to show improper conduct or blamable motives on the part of the master in referring the subject to the consul, or that he did not act in the belief that the libellants had committed offences against the laws of the United States, and that the consul had rightful authority to examine into and adjudicate upon the charges, and take order thereon against the seamen.

The consul certifies and returns in full the proofs taken by him, and states his proceedings to have been had by virtue of section 5 of article 35 of the consular instructions relative to seamen of the United States.

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The instructions referred to are not before the Court, but they probably have relation to the duties of consuls under the acts of 1803 and 1840.

Section 1 of the act of February 28, 1803, (2 *U. S. Stats.* 203,) implies the power of a consul to discharge a seaman in a foreign port, and to give a certificate of such act on his part; as by the provisions of the section such certificate of the consular consent to the discharge relieves the master from the penalty imposed for not bringing back to the United States such seaman with the ship.

The act of July 20, 1840, in terms requires the concurrence of the seaman and master in an application to the consul in order to authorize him to discharge the seaman in a foreign port under the provisions of subdivisions 5 and 6 of section 1 of that act. 5 *U. S. Stats.* 395. The discharge contemplated by those sections is, however, manifestly one from the obligation of the shipping contract, and has no connection with the authority of consuls in repressing criminal offences committed by seamen, or in bringing them to punishment therefor.

Subdivision 11 of section 1 of the same act, (Act of July 20, 1840, 5 *U. S. Stats.* 395,) declares, "it shall be the duty of consuls and commercial agents to reclaim deserters, and *discountenance insubordination by every means in their power*, and when the local authorities can be usefully employed for that purpose, to lend their aid, and use their exertions to that end in the most effectual manner."

It is known to be the familiar practice, in French ports especially, for consuls, upon the representations of masters of vessels, and on a proper substantiation of facts, to obtain the interposition of the local police, which of its own authority commits seamen to prison because of offences on board of their vessels, or for insubordination of conduct. Cases of this nature have for many years been of frequent occurrence.

It is also a common exercise of authority by American con-

suls in foreign ports, to send home for trial, in their own ships, or by a different conveyance, seamen accused of crimes committed at sea or in foreign ports. I am not aware that the obligation of ship-masters to bring home such prisoners, or the authority of consuls to transmit them, has ever been directly questioned. Some of our most distinguished Admiralty Judges have expressed strong doubts as to the power of consuls in these respects ; and also, whether, in case seamen are imprisoned abroad or sent home compulsorily by them, such acts exonerate the master from liability to the men for full wages and damages.

Those cases will be more particularly adverted to in another view of this subject. The question now raised in this cause, it is to be remarked, was not directly presented in those for decision ; and the suggestions of the Courts, as to the authority of those acts, were accordingly incidental, and in illustration of the general doctrines of the law.

The inquiry in the present case is, whether the consul, upon the facts asserted by him, could lawfully discharge the libellants from the ship, and authorize the master to make up his crew by employing others in their place.

The testimony taken before the consul proves that the conduct and threats of the libellants on board of the vessel were highly mutinous, and that the officers had reasonable grounds for fear for their lives, and had no power to control or restrain the men, at sea.

The testimony of the captain and his wife, taken by the consul, could not be admitted on the trial of the respondent in Court, the suit being personally against him for wages. The testimony, also, given by Cooper and Lewis, two of the crew, before the consul, was retracted, or changed in essential features on their examination in this Court. Two other persons on board, who were not witnesses before the consul, were examined in Court, as were also the libellants each for the others. These proofs rendered the balance of evidence

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plainly in favor of the libellants against the charge that their acts had been dangerous to the safety of the vessel or her officers. This result of the trial here, does not, however, authorize the conclusion that the case before the consul did not warrant his proceedings, nor but that the hearing in this Court, had it been on an indictment before a jury, where the testimony of the master of the vessel and his wife would have been competent, might have led to the conviction of the seamen of the mutinous conduct charged against them. The point, then, is whether the consular act, upon the proofs before him, in detaching these men from the ship, and ordering them home, to be there dealt with under the laws of the United States, on charges for criminal offences committed at sea, fails to bar their right to demand wages to the end of the voyage, because the evidence before the Courts on full hearing disproves the necessity or propriety of the consular order. It is to be observed that the decision of the consul is not given merely at the instance and on the representation of the master and respondent. He examined into the charges officially, and decided the course he would adopt upon full hearing of proofs.

Judges Hopkinson and Ware strongly intimate that the act of a consul in confining or discharging a seaman for criminal misconduct abroad, affords no protection to the master on a demand by the seaman for wages and expenses and damages accruing by his discharge or imprisonment. *The Mary, Gilp.* 31; *The William Harris, Ware*, 367.

The force of these suggestions may, perhaps, be regarded as modified by the views expressed by Judge Ware in the more recent case of *Smith v. Trent*, (4 *N. Y. Leg. Obs.* 13.) This was a suit brought by the libellant, a seaman on board of the *Nimrod*, against the master of the vessel, for the recovery of wages. It seems that, by reason of the criminal conduct of the libellant at sea, he was arrested, upon the arrival of the vessel at Point Peter, in the West Indies, and confined in

prison, no other civil authority. being invoked than that of the American consul at that place. He was subsequently, by order of the consul, sent home in irons to answer to the charges brought against him abroad for such offences.

In relation to that case, the Judge says: "As it was, it was certainly the duty of the master to call upon the civil authority of the place, and put the affair in a train of judicial examination. The result of that inquiry was, that Smith was sent home as a prisoner to answer for his conduct to the laws of his country. And from the facts developed on the trial here, it appears to me, that the civil authorities were perfectly justified in this course." 4 *N. Y. Leg. Obs.* 15, 16.

Although it is not conceded in this decision, that the consul's discharge of the seaman abroad, and issuing a certificate of such discharge, because of his criminal conduct, would bar to the man the recovery of his wages here, yet wages were in fact denied him, because, by his own misconduct, he had disqualified himself from performing the services for which wages were to be paid.

My mind is better satisfied with the more direct and practical principle applicable to the facts. The rightful authority and duty of the consul to interfere and take a seaman from his ship, when his continuance there is dangerous to officers or men, being recognized, (*Ware*, 16; *The Nimrod*, 4 *N. Y. Leg. Obs.* 13,) I think it results that such practical discharge terminates the connection of the seaman with the ship, and disqualifies him from suing the master or ship for after wages of the voyage, and it is quite immaterial whether the judgment of discharge rendered by the consul in this instance, constitutes a bar to the action, if his act legally separated them from the ship and her service.

This of course presupposes that there has been no improper collusion or deceit on the part of the master or owners, and that the consul has proceeded with integrity and on probable cause in his doings. The consul is personally liable to the

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party injured, if guilty of any abuse of power, for all damages occasioned thereby. *Act of 1840, art. 18; 5 U. S. Stats. 397* I apprehend, however, that the sounder and safer doctrine is, that when on clear *prima facie* proofs he orders a seaman to be discharged from a vessel for criminal conduct threatening the safety of the vessel, or of her officers or company, and transmits him home for trial on the accusations, such discharge is a bar to any continuing claim for wages, that might be enforced if his connection with the vessel still rightfully subsisted.

The propriety of the consul's interference is to be determined upon the facts before him at the time, and not by the case which may be shown afterwards on trial. As in the present instance, displacing part of the testimony legitimately admitted by the consul, and introducing other not heard by him, may give the case a new aspect, and show that the seamen, though debarred of wages *eo nomine* by the act of the consul, may yet resort to the master for damages because of their improper severance from the ship.

Although the evidence before me is irreconcilably conflicting on many points, I consider the preponderance of it to support the demand of the libellants for wages up to the time of their discharge, and that no forfeiture or bar of those wages is established by the respondent.

The expenses incurred by them in Marseilles, by imprisonment or otherwise, were not caused by the master. His application to the consul was that the men should be discharged or taken from the vessel. That was granted. Then the consul, following his own judgment of his duty in furtherance of public justice, had the men committed to prison, and afterwards sent home, as prisoners for trial.

The testimony does not fix upon the defendant any responsibility for these acts, which can be enforced in this form of action.

The decree will be, that the libellants, in these respective

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causes, recover their several wages up to the time of their discharge at Marseilles, with costs to be taxed ; and that the demand for wages to the termination of the home voyage be denied.

Order accordingly.

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A Court of Admiralty in this country may entertain a suit *in personam* for a balance claimed by a seaman to be due to him on an account of the profits of a voyage, as his share thereof, where the libel avers that a specific sum came to the hands of respondent as the proceeds of the voyage, and that libellant is entitled to a specific share of such sum.

On such a libel, the Court may inquire into the validity of any charges in account made by the respondent against the libellant, and relied upon as reducing or satisfying his share.

A Court of Admiralty cannot entertain a libel *in personam* which seeks to bring respondent to a general accounting for the proceeds of the voyage, and to compel an adjustment of the proportion in which libellant is entitled to share in them.

THIS was a libel *in personam* by William Duryee against George B. Elkins, to recover libellant's share of the takings of a whaling voyage.

The libellant was one of the crew of the whaling ship Sarah. He filed his libel August 10, 1848, against the defendant, sued as owner or part-owner of the ship, and assignee of the proceeds of the whaling voyage in which libellant served, and garnishee of the master's interest therein, seeking to recover libellant's share, alleged to be the one hundred and ninetieth part of the takings of the ship.

The libel charged that the libellant shipped at New York in December, 1843, and made the voyage with the ship, in various parts of the Pacific Ocean, until July 1, 1846, when she put into Tahiti, was there condemned as unseaworthy by the United States consul, and the crew discharged ; that the oil and bone taken by the ship were sent home and

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sold for the use of the owners ; that no account had ever been rendered to the libellant of the proceeds of the voyage and of his share thereof, though he had demanded an account and payment of the share due him.

The libel prayed process of arrest against the defendant, (with a clause of foreign attachment,) to compel him to appear and answer the libel and such interrogatories as might be propounded to him, and that he might come to a just, reasonable, and equitable accounting with the libellant of and concerning the libellant's lay or share of said voyage, and be decreed to pay to the libellant whatever balance might be found due to the libellant upon such accounting.

The answer of respondent, filed September 5, 1848, admitted the main facts averred in the libel respecting the respondent's ownership in the vessel, and the voyage made by her ; but averred that the libellant's lay was a two hundredth part instead of a one hundredth and ninetieth, as alleged by him, and also that respondent had made up and delivered to libellant an account of the expenses and proceeds of the voyage, and of the advances and payments made to libellant, upon which account the libellant stood indebted to the ship in a large sum. The respondent therefore prayed a decree, with costs in his favor.

On the hearing, proofs were put in to substantiate the matters set up in the answer ; but the cause was finally disposed of on the question of jurisdiction.

Alanson Nash, for the libellant.

I. The Court of Admiralty in England, prior to the restraining act of Richard II., possessed jurisdiction over all cases of jettison, ransom, average, consortship, insurance, mandates, procurations, payments, acceptilations, discharges, loans, hypothecations, forms, emptions, venditions, conventions, taking or letting to freight, exchanges, partnership, factorage, passage-money, and whatever is of a maritime nature, either by way of navigation upon the sea or of negotiation at

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or beyond the sea in the way of marine trade and commerce. (See the old Sea Laws, p. 209, being an extract from Godolphin's Sea Laws, &c., in his view of the Admiralty jurisdiction.) So, also, the Court had jurisdiction over all matters immediately relating to the vessels of trade and the owners thereof; all affairs relating to mariners, whether ship officers or common seamen; all matters relating to masters, pilots, steersmen, boatswains, and other ship officers. Also all shipwrights, *fishermen*, and ferrymen. Also of all causes of maritime contracts, or, as it were, contracts whether upon or beyond the seas.

II. The statute of 13 Rich. II. declares, that the admirals and their deputies shall not meddle henceforth with any thing done within the realm, but only with things done on the sea. This statute was passed in 1389. The next statute, which was passed in the 15th Rich. II., or in 1391, prohibited the admirals to hold pleas of matters arising in the body of the county; in other words, these two statutes put together prohibited the admirals to hold pleas of things done on land, and also of things done or arising in the body of the county, though done upon the sea. In all other respects they left the Admiralty jurisdiction precisely where they found it.

The statutes are both local, and do not extend to any case not arising on land, or within the body of a county in England. *Hussey v. Christie*, 13 *Ves.* 594; *Rolle, R.* 250.

A statute of 1391 declared, that the admirals should not hold plea of matters arising in the body of the county, or of wreck. Our Courts have disregarded this statute by express decision; they do take cognizance of wreck. *Hobart v. Drogansi*, 10 *Pet.* 108; *The United States v. Comb*, 12 *Ib.* 72.

III. The Lord High Admiral of England, and also of Scotland, the Judges of the Admiralty Courts in North America, including New Hampshire, Massachusetts, and Virginia, formerly received commissions from the crown to hold "jurisdiction of pleas, bills of exchange, policies of assurance, *accounts*,

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charter-parties, agreements, and other things had or done in or upon or through the seas or public rivers of fresh waters, streams, havens, and places subject to overflowing whatsoever within the flowing and ebbing of the sea, upon the shores or banks whatsoever adjoining to them." *Dunl. Adm. Pr.* 34.

IV. Our Courts have held the doctrine that they would take jurisdiction over cases of consortship. *Wall v. Andrews*, 2 *N. Y. Leg. Obs.* 157. Here is a case of accounting between parties.

V. The Court may take this account by means of a reference to the register or to an auditor or assessor appointed for this purpose. Indeed, there is the same right in the Court of Admiralty to refer a cause to an officer created for this purpose, that there is for a Court of Equity to refer any matter to a master. Every Court has an inherent power to refer cases for their information to officers created for this purpose. *Lee's Dict. of Pr.* tit. Master's Report; 1 *Tidd's Pr.* 518; *The King v. Wheeler*, 1 *W. Blackst.* 311; *Hoffm. Ch. Pr.* Intro. 16, note 13; 7 *Bac. Abr.* tit. Officers, C.; 1 *Pet.* 604; 5 *Ib.* 187; *The Betsey*, 3 *Dall.* 6; 3 *Bulstr.* 205; 13 *Coke*, 52; *Lindo v. Rodney*, *Doug.* 613; *The United States v. Goodwin*, 7 *Cranch*, 32; 1 *Bac. Abr.*, Phila. ed., tit. Admiralty Courts.

E. C. Benedict, for the respondent.

BETTS, J. A question of practical importance arises upon the face of these pleadings; that is, whether an Admiralty Court can take jurisdiction of a claim of a seaman for a share of the proceeds of a fishing or whaling voyage, before the accounts of such voyage are made up; in other words, whether the Court can bring the parties to an accounting, and, by its decree, adjust their respective rights in the adventure.

When the voyage is made up, Admiralty Courts will take cognizance of suits by seamen for their respective shares of the aggregate. *The Sidney Cove*, 2 *Dods.* 11. In a whaling voyage the account may be referred to a commissioner, to see

that the computation is correct, or that no improper items are inserted against the crew. *Reed v. Hussey*,¹ (*MSS.*) August, 1836. That is done, however, not on the ground of an original authority to compel the account, but regarding the voyage made up as an admission of the sum to be distributed to the ship's company, each seaman can have his remedy in this Court for his aliquot part thereof, and may claim the aid of the Court to protect him against overcharges. The same principle would extend to the case where the proceeds of the voyage are realized by the owner, and he refuses or neglects to make up the voyage, or holds the takings of the adventure in his possession at the home port an unreasonable length of time without sale. In such case the Court may equitably regard him as appropriating the cargo to himself; and adopting the price received as the market value, may award to the seamen their compensation on that footing. The seamen may thus be permitted to claim their proportionate part of the entire value in the hands of the owner, throwing on him the burden of proving the charges and deductions to which it is subject under the shipping articles.

The case of *Reed v. Hussey* was one of wreck, where portions of the oil were saved and transmitted to this port and sold, a small parcel having been previously remitted home and sold during the continuance of the whaling voyage, and the voyage was made up by the owner on the footing of such net receipts. To that extent, the remedy of the sailor was allowed in this Court.

The libellant does not proceed for an acknowledged or proved account of takings come to the defendant's possession, but demands an original and full accounting for the whole

¹ Since reported, 1 *Blatchf. & H.* 525. This case was affirmed on appeal to the Circuit Court, December, 1837.

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voyage. In this respect the case differs from that above referred to, which occurred in this Court. If the libel had set up a specific amount realized by the defendant as the earnings of the voyage, and the libellant had then claimed an entire one hundred and ninetieth or two hundredth part of the gross sum, I cannot perceive any objection to the jurisdiction of the Court over the case as thus shaped, or to its competency to try and decide the case, so as to preserve all legal rights to all parties. The defendant might be required then to justify the charges claimed by him as a satisfaction of the libellant's share, and the office of the Court would be no more than to examine and adjudicate upon the credit so claimed.¹

The case made by the libellant, however, rests upon the assumption, that he is entitled to have the accounts at large stated in this Court, and to be secured the value of the takings irrespective of the method of disposition adopted by the master or owners, or the actual amount realized. It would be his right undoubtedly, in equity, to overhaul all the proceedings of the master and owner, and to compel them to secure him the entire value of his earnings according to the terms of his shipping agreement, and that without regard to the method of adjustment stipulated by the articles, if he could establish any unjust or inequitable conduct on the part of the owner or his agents, in disposing of the takings of the voyage or in making up the accounts.

But can this be done by a Court of Admiralty? As a general principle that Court does not take cognizance of partnership transactions, nor of any method of securing to a seaman compensation for his services, excepting on an agreement express or implied for the payment of wages. And thus all extraordinary arrangements, such as those secured by deed,

¹ Compare *The Atlantic*, *ante*, 451.

(*Howe v. Napier*, 4 *Burr.* 1944 ; *Campion v. Nicholas*, 2 *Stra.* 405 ; *Opy v. Child*, 1 *Salk.* 31 ; *Day v. Serle*, 2 *Barnard*, 419 ; S. C. 2 *Stra.* 969,) or those contemplating a participation of profits, (*The Sydney Cove*, 2 *Dods.* 11 ; *The Mona*, 1 *W. Rob.* 137 ; *The Riby Grove*, 2 *Ib.* 52,) are by the English law excluded from that class of contracts on which seamen are privileged to sue in Admiralty. *Abbott on Shipp.* 659.

The rule in the Courts of this country has not been so restrictive upon the remedies of seamen, (*Macomber v. Thompson*, 1 *Sumn.* 384 ; *The Crusader*, *Ware*, 437,) the Courts being inclined to regard only the fact, that the agreement was or was not intended to secure to the seaman wages for his services. If that is the purpose, it may be enforced in Admiralty, although the wages were to arise out of a participation in the earnings of a freighting or fishing voyage, or although they were secured by a bond or other specialty. It is accordingly the common usage of the Courts of the United States to entertain libels for shares or proportions of earnings in fishing voyages, such shares being the measure of the amount of wages. A suit in Admiralty or at law may be maintained for such shares when ascertained by a final settlement of the voyage. 3 *Pick.* 435.

In principle, there is no distinction between a suit *in personam* in Admiralty and a common-law action for the recovery of wages. The same ingredients enter into the rights of both parties in each tribunal. The demand rests upon an agreement express or implied, and is enforced according to the methods of procedure of the respective Courts.

Thus an action lies at law by a seaman to recover his proportionate share of a whaling adventure, after the oil has been sold, and the amount liquidated out of which the share is to be completed. *Wilkinson v. Frasier*, 4 *Esp.* 182. That doctrine has always been adopted in this Court, and numerous suits and recoveries have been had on libels so filed after the whaling voyage was made up.

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There is no difficulty in furnishing the remedy when the materials are supplied from which the right is shown or may be deduced. The relief by suit in Admiralty proceeds upon the same doctrine and like proofs as in the common-law action of assumpsit.

Do the functions of the Court admit of its managing an action of account either according to the common-law practice, or under that of a Court of Equity?

The ancient common-law action of account is rarely used at this day. It was applicable to transactions between a lord and his bailiff, a man and his receiver, between partners and against administrators, &c. *Finch, N. B.* 116; *Co. Litt.* 172; 1 *Bac. Abr.* tit. Account; 2 *Rev. Stats.* 50, 306; *Duncan v. Lyon*, 3 *Johns. Ch.* 360. The action may be barred by plea that defendant has accounted. *Baldw. C. C. R.* 418. The action was founded on contract, and it was necessary that all parties should be joined in it, and that the defendants should have no claim in the thing to be accounted for. 1 *Dane, Abr.* 164.

The auditors or referees can examine all parties on oath, and accordingly the proceedings in the action at law are of the same character and of similar efficacy with those in equity. *Duncan v. Lyon*, 3 *Johns. Ch.* 360; 2 *Story*, 648.

In this Court, no other examination of parties can be had than by propounding interrogatories to be answered by them in connection with the pleadings. There is no usage or practice authorizing a referee or commissioner to call a party before him for an oral examination; and accordingly, if an Admiralty suit embraced all the parties necessary to a full and proper accounting, there would be wanting, in order to carry it fully into effect, that essential attribute of the proceedings at law and in equity.

For that reason, it has been explicitly decided in this Court, that a suit *in rem* will not lie in a case where an accounting

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is required and must be decreed. *The Fairplay*,¹ (*MSS.*) February, 1830.

The jurisdiction was interdicted in England "in accounts betwixt merchant and merchant or their factors," (*Dunl. Adm. Pr.* 16 ;) and although in *The Fairplay*, the Court withheld the expression of any opinion as to the right to sue *in personam* to compel an accounting, yet the reason of the decision applies with equal force to either form of action. The difference between the two, relates mainly to the greater inconvenience of keeping property on attachment pending an accounting, than that of subjecting a party to give bail.

In the case of *The Fairplay*, the master had chartered the vessel, and the libellant engaged to run her with him a period of five months, upon an agreement to share with the master one half of her earnings and profits. The other half was to be paid to the owner. No account had been stated between the parties. The libellant alleged there was due him the sum of \$305.81 as his share of the earnings and profits. The answer denied the debt, and averred that the libellant stood indebted upon the adventure in the sum of \$139.60. The decision went upon the general doctrine that this Court would not entertain an action for an account, laying stress upon the fact as a corroborative reason, that the vessel must be held in custody pending such accounting.

A whaling adventure is not regarded in our law as a partnership connection, but, as between the owner and crew, a trust is created and the right of the crew to compensation is, by the shipping agreement, usually made consequent to the acts of the trustee. A Court of Equity can no doubt secure the rights of a whaling crew independent of the method

¹ Since reported, 1 *Blatchf. & H.* 136. This case was affirmed on appeal to the Circuit Court, in July, 1830.

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arranged and agreed between the parties, when the neglect or misconduct of the crew interposes any impediment to legal relief.

But is this within the powers of Courts of Admiralty proceeding *in personam*? They are clearly controlled by the shipping agreement in the remedy they administer, provided that agreement is valid. In the present case, the engagement in the articles is by the owner (on the fulfilment of the conditions stipulated by the crew) "to pay the shares of the *net proceeds* of all that shall be obtained by the crew during said voyage, as soon after the return of the voyage as the oil, or whatever else may be obtained, can be sold, and the voyage made up by the owner or agent of said ship, first deducting all such sums as may be due from them to the owner or officers thereof, for advances, supplies, or debts arising from other considerations." The libel charges that the defendant refuses to give the libellant an account of the voyage or pay him his dues, and prays the Court to decree that the defendant come to a just, reasonable, and equitable accounting with him, of and concerning his share or lay of said voyage, and pay him whatever balance may be found on such accounting. It is true he claims general damages to \$300, but he does not aver that such amount is due him on the account, nor that any specific sum whatever has come to the respondent from the takings of the voyage.

The difficulty thus presented is not obviated by the answer, and it is manifest that the relief the pleading seeks, and the only one to which it is adapted, is that of an original accounting upon all the particulars of the voyage. The counsel for the libellant maintained this view of the case in his argument, and strenuously presses the right of his client to such account, and the necessity of its being decreed him.

In my judgment, the case as brought before the Court is not one of which it can take cognizance. The appropriate relief would be a bill in equity, setting forth the amount of

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takings, and requiring the respondent to account for their disposition.

If, however, the libellant elects to go upon the account set forth by the answer, a reference may be taken to a commissioner to ascertain and adjust the amount of payments properly chargeable to the libellant, and report whether any balance is due him out of the lay of \$117.75, credited him on the account made up by the defendant.

Decree accordingly.

SIMPSON v. CAULKINS.

A libel was filed by each of two members of a ship's crew to recover damages for breach of a shipping contract; and subsequently eleven other libels were sworn to by eleven other members of the crew, upon the same state of facts and upon the same cause of action. Before answer was filed to either of these libels, and before the eleven libels were filed, a stipulation was entered into that the thirteen causes should be consolidated. An answer, presenting two issues, was then put in, and the cause having been brought on for hearing, the libellants prevailed upon the first issue, but the respondent succeeded upon the second.

Held, on appeal from taxation of costs, 1. That the costs of the two separate libellants and of the respondent were to be taxed in both the two suits first commenced, up to the date of the consolidation; but from that date libellants' costs were to be taxed only in the suit which was thereafter prosecuted.

2. That full costs of the issue on which the libellants prevailed should be taxed in their favor, and full costs of the issue on which the respondent succeeded should be taxed to him; and that these two bills should be set off the one against the other, and the balance paid by the party from whom it might be due.

THIS was a libel *in personam*, by Thomas Simpson against Daniel Caulkins, master of the ship Sabrina, to recover damages for breach of a shipping contract.

Twelve other causes were instituted on the same facts and for the same cause of action, by Simpson's fellow sailors in the voyage on the Sabrina, and were consolidated with the

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present. The cause now came before the Court on appeals taken by both parties, from the taxation of costs by the clerk.

The facts on which the appeal was based are sufficiently stated in the opinion.

Alanson Nash, for the libellants.

E. C. Benedict, for the respondent.

BETTS, J. On January 15, 1848, the libel of Thomas Simpson in this case, was sworn to by the libellant. It was filed on the 17th, and the warrant of arrest was issued thereon the 18th, and served during January. •

Peter Williams filed his libel on the 18th of January, and the process was issued the same day. Eleven others of the same crew attested to libels on the 17th, and the same were filed the 19th of January.

These libellants were all members of the crew of the ship *Sabrina*, of which the respondent was master. They all shipped at this port, sailed out together, made the same voyage, and returned and left the ship at the same time.

On the 18th of January, by written consent of the respondent's proctors, the thirteen causes were consolidated, and on the 8th of February an answer to the consolidated actions was filed.

The libel in the case of Simpson is special, and sets forth the case attempted to be maintained on the hearing. The others are the general printed forms, claiming wages, as upon an ordinary shipping contract. The special libel will, therefore, be regarded as being the one which has been adopted by the consolidation.

The libel alleged a contract for a voyage from New York to St. Johns, and thence to one or more ports in Europe and back to a port of discharge in the United States; averring that the voyage was only made to Nova Scotia and then directly back to New York, where the libellants were discharged by the master, without their consent and to their great dam-

age. The libel charges that the current wages for the voyage run were higher than those they agreed to receive, and they were retained on wages only two months, whilst the voyage contracted for was one of eight months, whereby a deceit and fraud was practised upon them, and they were subjected to great loss and expenses. Each libellant demands \$40 for such special damages.

The answer denies the contract set up by the libellants, and avers that, at the option of the ship-owners, they shipped for a voyage from New York to St. Johns, Nova Scotia, thence to Pictou, and back to New York; or from St. Johns to one or more ports in Europe, and back to a port of discharge in the United States, and signed shipping articles therefor; that the voyage to Nova Scotia and back only was performed; and that the ship not being able to put into Pictou because of obstructions of the harbor by ice, returned directly from St. Johns to New York. It also alleges a tender to the libellants, in full of their wages for the voyage, of various sums amounting in the whole to \$146.45.

The case went to hearing upon these pleadings. Two issues were involved in it: 1. Whether the tender was full satisfaction of the wages for the voyage performed. 2. Whether the contract entered into was actually for a voyage to Europe, and whether the respondent violated the agreement, to the damage of the libellants.

The decision of the Court upon the hearing on the report of the commissioners, was in favor of the libellants upon the first issue, and in favor of the respondent on the other. And it was decreed that the libellants recover the difference between their wages reported due, and the sum tendered, with costs, including the costs of the reference and on exceptions; and that the costs of litigating the claim for damages for not performing the alleged voyage to Europe, be taxed against the libellants; and that the respective costs thus created, be set off,

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the one against the other, the balance, if any, to be collected of the party against whom it might be found.

Under this decree the libellants made up and claimed costs in the suit instituted by Simpson, at \$70.87½, at which sum the bill was taxed ; and in the case of Peter Williams alone, to the sum of \$148.75, and in the other eleven causes subsequently united by consolidation with the two others, to about the sum of \$23 each. These eleven bills the clerk refused to tax. From that decision the libellants appeal ; and the respondent appeals from the taxations made of the other two bills, both in respect to the items admitted therein, and upon the principle that only one bill could be made up and referred.

The respondent presents, also, thirteen distinct bills of costs, and claims to have taxed in his favor \$11 in eleven of them, \$14.50 in one, and \$143.30 in another. The clerk taxed one bill at \$14.50, one at \$97.43, and refused to tax the other eleven bills. From these taxations both parties, also, appealed.

Two general questions arise under these appeals :—

First.—Can either party legally claim more than a single bill of costs in the causes ?

Second.—What rule of distribution is to be observed in allotting the successful parties their proper portion of costs created in the progress of the litigation ?

1. If it may be supposed that thirteen distinct suits might in these cases have been carried through to final decrees, each carrying full costs, unless the Court or parties interposed to unite them, it would still be a question always open to inquiry, at what time any particular one of the number was commenced, and must be deemed in prosecution ; because where a particular service enures to the common benefit of other parties, compensation therefor may be allotted to the one first performing it, at his instance, because of the insufficiency of the fund to satisfy his entire demand, or upon the

equity of the party condemned in costs, not to be burdened with a repetition of payments for a single service.

At common law an action is deemed commenced on the issuing of the *capias*. 5 *Cow.* 514. The Revised Statutes of New York, however, require the actual arrest of the defendant on it, or that the *capias* be issued in good faith with intent to arrest him. 2 *Rev. Stats.* 299, § 38.

In Admiralty, causes are initiated by arrest of the thing, (2 *Leol. Jenkins*, 775; 1 *Hagg. Adm. R.* 124,) or of the person (*Hall's Adm. Pr.*, tit. 1,) proceeded against.

At the time these thirteen cases were consolidated, no more than two suits had been instituted. The filing of libels the day subsequent to the consolidation, could not confer on them the character of pending actions, before process was served or even awarded by the Court.

The two cases of Simpson and Williams must, under the proceedings as placed before the Court, be regarded as in prosecution, separately and rightfully, up to the stipulation to consolidate them. No doubt the Court might be compelled, under the act of Congress of July 23, 1813, (3 *U. S. Stats.* 19,) to deny several costs, if there was evidence that the actions had been unnecessarily multiplied; but as the libellants had no authority to unite in a common cause, it will not be presumed that any improper motive led to the commencement of suits by each, especially as the respondent might have defences to them severally, distinct and independent of each other.

Although the causes might not be of a character to admit a direct consolidation, yet on a proper application, the Court would always apply the relief familiar to the English courts and our own, prior to any statutory regulations on the subject, and by order, compel the stay of all the causes but one, and that the residue abide the award of the contestation of that. *Coleman's Cas.* 62; 1 *Johns. Cas.* 28; *Tidd's Pr.* 645. Only the taxable costs incurred up to the period of such order

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would be allowable, with, perhaps, the addition of such as might become necessary subsequently to secure the parties the benefit of the rule of consolidation.

Accordingly the costs of the two separate libellants, and of the respondent in those two actions, should be taxed up to the 18th of January, the time of the consolidation. After that period, only one suit is to be recognized, and a single bill of costs to be allowed to either party as against the opposite one.

2. The rule of costs prescribed to the State courts by the Revised Statutes, in case of variant judgments upon multifarious issues in the same case, is recommended, both by its high authority and the reasonableness of its provisions, and was adopted by both as proper to be applied in the allowance of costs to their respective parties: that is, that the one who succeeds on the essential merits in the case shall obtain full costs, although he fails on incidental branches of it. 2 *Rev. Stats.* 511, § 17-21. The Courts have interpreted and applied those provisions in various instances, so as to secure costs to a party who prevails upon a distinct and material cause of action in a suit, although judgment on the whole cause may be in favor of his opponent. No limitation is made to special forms of action. It has effect in actions of ejectment, replevin, tort, contracts, dower, &c. 12 *Wend.* 285; 19 *Ib.* 626; 20 *Ib.* 666; 1 *Hill*, 359; 6 *Ib.* 265, 267, 268; 1 *Denio*, 661; 2 *Ib.* 188. Similar principles govern the practice of other State courts. *Meacham v. Jones*, 10 *N. Hamp.* 126; *Nichols v. Hays*, 13 *Conn.* 155. The purport of the decision denotes that in these duplicated allowances of costs, each party taxes full costs, throwing out only those items palpably appertaining to the bill of his adversary.

In the United States Courts, costs are not matters positively appointed by law, but are allowed in the exercise of a sound discretion by the Courts, conformably to the usages governing their proceedings. *Canter v. The American and Ocean Insurance Companies*, 3 *Pet.* 319; *The United States v. The*

Brig Mabel, 2 *How.* 237. The statutory directions under which the State courts act, accordingly impart no higher authority to regulate the subject, than is possessed by the United States' tribunals under their general powers. The difference is only that in the one case the rule is stringent and imperative, and in the other obtains and is enforced only because of its reasonableness and adaptation to the rights of the parties, in so far as these objects may be subserved by means of costs.

In these cases it is accordingly ordered, that the libellants and respondent have taxed in their respective bills, the proper taxable items, both in the suits by Simpson and that by Williams, up to the time of the consolidation; and that thereafter only one bill of costs be taxed in favor of the libellants and one to the respondent, each party being allowed full costs, with the exception of those particulars shown to the satisfaction of the taxing officer to belong with the items allowable to the opposite party.¹

Order accordingly.

¹ The act of Congress of February 26, 1853, (10 *U. S. Stats.* 161,) appointed specific costs to the officers of Courts, in causes of admiralty and maritime jurisdiction. The items of allowance are no longer left to the discretion of the Courts, and that subject of litigation has ceased to pervade the discussion and decision of causes; still the leading principles controlling the disposition of those costs between litigant parties, have application and force under the existing law, and it was, therefore, thought proper to report the above case as one still possessing general interest.

Miner v. Harbeck.

MINER v. HARBECK.

Where a United States consul in a foreign port discharges a seaman without payment of three months' wages, (under 5 *U. S. Stats.* 395, § 1,) the discharge will not avail the owner as a defence to a suit for the two months' wages, which by the provisions of the act accrue to the seaman, unless the consul makes an official entry of his act both upon the list of the crew and upon the shipping articles.

These entries must be made by the consul personally.

THIS was a libel *in personam* by Lewis Miner, against William H. Harbeck to recover wages as seaman.

The facts are stated in the opinion of the Court.

BETTS, J. The libellant shipped at this port on July 8, 1848, on board the brig Susan, on a voyage to the south of Europe, thence to one or more ports in South America, and thence to such other ports or places as the master might direct, for a term not exceeding twelve calendar months. The ship went to Lisbon, and thence to Rio Janeiro, when the captain chartered her to the coast of Africa, and back to Rio Janeiro.

On December 21, 1848, the libellant (with others of the crew) was there discharged at his own request and by consent of the master, and his wages were paid him in full to that day; and the same day he shipped on board the bark Elvira Harbeck, owned by the same persons, for the United States.

There is no ground of claim in the case other than for three months' wages because of the discharge at Rio Janeiro. The libellant left the brig from choice, and the respondent had no agency in his discharge other than the assent of the master to it. It was not procured or suggested by him. The libellant can maintain no claim for wages to the time of his return to the United States, because his term of service had not then

expired, and he would have been bound to offer to remain with the brig to the end of twelve months. The equity of his claim, therefore, clearly rests on the effect of his discharge according to the provisions of the statute.

By section 3 of the act of February 28, 1803, (2 *U. S. Stats.* 203,) the discharge of a seaman abroad by his own consent, subjects the master to the payment of three months' wages, two of which enure to the benefit of the seaman himself. The act of July 20, 1840, (5 *U. S. Stats.* 395, § 6,) so far varied this regulation as to authorize a discharge, on mutual consent of the master and mariner, by a consul abroad, without payment of the three months' wages, if the consul thinks it expedient not to require such payment.

But the discharge is of no efficacy unless the consul makes an official entry thereof upon the list of the crew and the shipping articles. 5 *U. S. Stats.* 395, § 7.

This formality was not observed in the present case. The master testifies that the discharge was authorized and made by the consul, but only one certificate, that to the crew list, was given, and that was executed by a deputy, and not by the consul personally.¹

This is not a compliance with the conditions of the statute, and, therefore, cannot avail the owner as a legal defence to the action. The defect is merely technical, for the proof is uncontradicted that the consul acted personally in the matter, that the libellant desired his discharge and accepted his pay, and that the consul fully approved the arrangement.

Still, under the circumstances, the libellant is in law entitled to recover the two months' wages demanded, the allotment of them to seamen on such discharges not being spe-

¹ On the effect of a formal and valid consular discharge as a protection to the master and owners, see *Lamb v. Briard*, *ante*, 367; *Tingle v. Tucker*, *ante*, 519. For other defects in the form of a consular certificate, see *The Atlantic*, *ante*, 451.

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cially for their benefit, but in furtherance of the national policy of deterring masters of vessels from leaving seamen abroad. He is, however, equitably bound to account for his earnings on board the *Elvira Harbeck*, and if they equal the \$36 payable at Rio Janeiro, they will extinguish his demand, and must be applied to its satisfaction. He may accordingly, at his option, have a reference to ascertain the amount of wages paid him by the latter vessel, and if it was less than \$36, take a decree against the respondent for the balance.

Decree accordingly.

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The owner of the vessel takes the risk of working weather during the time required for the unlading of the cargo.

The consignee takes the risk of roads and means of transportation from the dock; and is bound to take the cargo as delivered to him at the vessel's side, and to remove it as fast as the vessel can be reasonably discharged.

It seems that the consignee cannot be made liable for demurrage where there is in the charter-party or bill of lading no express agreement or stipulation in respect to it, or in respect to lay days.

The *freighter* is liable to the vessel for any unnecessary detention in loading or unloading, although no express contract is made on the subject; and compensation for such detention may be recovered under the name of demurrage.

Upon what principles demurrage for the unnecessary detention of a vessel while unloading, should be computed.

THIS was a libel *in personam* by James Sprague and others, owners of the schooner *John R. Watson*, against J. Selby West, to recover damages for the detention of a vessel.

The libel in the cause was as follows:—

“To the Honorable Samuel R. Betts, &c.

“The libel of James Sprague, Charles Keen, David Crowell, and Daniel Butler, owners of the schooner *John R. Watson*, against J. Selby West, of said district, coal dealer, in a cause of contract, civil and maritime, alleges as follows:—

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“*First.*—That in the month of December last, the said schooner lying at Philadelphia and destined on a voyage to New York, Richard Jones & Co. shipped on board the said schooner one hundred and ninety-four tons of coal, or thereabouts, to be therein carried from Philadelphia to New York, and there delivered in like good order and condition, (the dangers of the sea only excepted,) to J. Selby West, or his assigns, to whom the same belonged, he or they paying freight for the same, at the rate of ninety cents per ton; and accordingly, the master of said schooner at Philadelphia, on the fifteenth day of December last, signed the usual bill of lading, a copy of which is hereto annexed.

“*Second.*—That shortly afterwards the said schooner set sail from Philadelphia to New York with the said coal on board, and there safely arrived on or about the nineteenth day of December; and on the next day James Sprague, the master of said vessel, caused a written notice to be served upon J. Selby West, the consignee and owner of the coal, as follows:—

‘NEW YORK, December 20, 1848.

‘SIR: You will please take notice, that the schooner John R. Watson, under my command, and loaded with coal consigned to you, was ready to discharge cargo this morning, of which fact you have been duly notified. And you will further take notice, that demurrage will be demanded for every day she is detained. Yours, &c. JAMES SPRAGUE.

‘To J. Selby West, Esq.’

“*Third.*—That the said West accepted the said cargo, and commenced to receive the said coal, but refused to take it, save in very small quantities and at irregular times, capriciously and vexatiously; and when urged and requested to take the same more expeditiously, replied, that he would take it when it suited him, and no faster, and would keep the

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schooner as long as he wanted to, for the captain could not help himself; and in accordance with such threat, he detained the said schooner until the fourth day of January, instant, on which day fifty tons of coal were still on board and were taken out by him and his agents, and the schooner completely discharged.

“Fourth.—That during the whole time the said schooner was so detained, she was obliged to lie at the foot of Forty-second street, in the North River, that being the place designated by the bill of lading, in danger of being frozen up and compelled to winter here; and her whole crew were detained at the expense of the vessel, and two extra men and a horse were kept constantly waiting on the dock during very severe and cold weather, ready to deliver the coal whenever the said West should take it away. And the said West was often notified by the master of the said schooner that said master was constantly ready to deliver said coal, and that the expense and damage of such detention would be demanded of him.

“Fifth.—That the usual and sufficient time to discharge such a cargo of coal is four days, and these libellants claim to be entitled to have of the said West the damages sustained by them by reason of the unjust detention of said vessel beyond that time, which they allege amounts to the sum of two hundred and thirty-one dollars and upwards.

“Sixth.—That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States, and of this honorable Court.

“Wherefore these libellants pray that a warrant of arrest in due form of law, according to the course of this honorable Court, in admiralty and maritime cases, may issue against the said J. Selby West, and that he may be compelled to answer upon oath all and singular the matters aforesaid, and that this honorable Court would be pleased to decree the payment of the damages aforesaid, with costs, and that he may

have such other relief as in law and justice he may be entitled to recover.

JAMES SPRAGUE."

On the hearing of the cause, it appeared on behalf of the libellants, that the John R. Watson took in at Philadelphia a cargo of coal belonging to respondent and consigned to him at New York. There was no stipulation in the bill of lading (which was in the usual form) relative to demurrage, detention, or lay days. The vessel arrived at New York, and on December 20, 1848, as stated in the libel, and again on the 21st, the respondent was notified in writing that she was ready to discharge. Three working days were enough to discharge the cargo, and the master and crew were at all times ready, but the vessel was not in fact discharged till January 4, 1849; for the reason that the respondent did not send carts enough to remove the coal as fast as it could be discharged.

The respondent denied the jurisdiction of the Court; denied his liability for demurrage in the absence of an express contract; and justified his delay in receiving the cargo, on the ground of bad weather, bad streets, and the distance of the place where the vessel lay from his coal yard.

Other facts are stated in the opinion.

E. C. Benedict, for the libellant.

H. Brewster, for the respondent.

BETTS, J. A cargo of one hundred and ninety-four tons of coal, belonging to the defendant, was shipped at Philadelphia on board the libellant's vessel. The master signed a bill of lading to deliver the same to the respondent at Forty-second street, New York, for ninety cents per ton, freight.

The vessel arrived at the place designated on the 19th of December last, and the respondent, not being able to receive the coal at that place, ordered the master to moor at Twenty-ninth street and unload there. The vessel took her berth at

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that place the same day, and the next morning was ready to commence discharging, of which a verbal notice, and afterwards a written one, was given the respondent, with further notice that demurrage would be claimed of him for any unnecessary detention of the vessel. The written notice was sent the 21st. The respondent failed supplying the carts necessary to remove the coal, and the vessel was not fully discharged of her cargo until the 4th of January following.

Although the weather was at times stormy and the roads bad, yet, on the proofs, neither of these circumstances prevented unlading the vessel and removing the cargo at once; and it is well established by the proofs, that with ordinary diligence the cargo could have been delivered in three days. The libel alleges that four days was amply sufficient.

The libellants undoubtedly took the hazard of working weather. The evidence to that point is satisfactory, that coal was constantly unladen and carted from North River Piers during those days; and a vessel of the burden of this one, coming to her dock the same day, and having one hundred and fifty tons on board, was completely discharged and sailed again within three days. The state of the weather, therefore, did not prevent the work being done.

The respondent was bound to take the risk of roads and means of transportation from the dock. He was to take the coal as delivered him at the vessel's side, and to supply means of removing it as fast as the vessel could be reasonably discharged. This is the general rule of maritime law, (*The Grafton*,¹ (*MSS.*) November, 1844,) and the evidence in the present case shows it the established custom of the coal trade at this port.

The respondent had then the 20th, 21st, 22d, and 23d days

¹ Since reported, *Olcott*, 43. This case was afterwards affirmed on appeal to the Circuit Court.

of December, when the weather was suitable and the vessel in readiness to discharge, which could have afforded him time to take away the whole cargo. But, giving him four full days, including the 21st, and deducting Sunday, the 24th, and Christmas, the vessel should have been discharged the 26th, and her detention beyond that period was unnecessary, and caused by the fault and delinquency of the respondent.

● The position is taken by the respondent, in objection to the claim of demurrage, that it is only recoverable on an express stipulation to pay it, and that the bill of lading being an ordinary one in this case, the libellants have no remedy against the consignees, beyond the freight stipulated to be paid.

It is not to be denied, that the practice would be more prudent, and liable to cause less disturbance to navigation and trade, if the parties, as suggested in some of the English cases, would note in the bill of lading or charter-party, the time allowed for lading or unlading the vessel at her ports of affreightment or discharge, and also the consequences of overrunning that period. And probably, upon the more modern authorities, (*Abbott on Shipp.* 304 ; 3 *Johns.* 342,) a consignee cannot be made liable on an implied obligation for demurrage, no express agreement or stipulation being made in the charter-party or bill of lading, in respect to it or to lay days. But the doctrine is different in regard to the *freighter*. He is held liable to the vessel for any unnecessary detention in loading or unloading, although no express contract is made on the subject. *Holt on Shipp.* Pt. 3, c. 1, § 25. To the same effect are the ancient ordinances, and the rules of other maritime countries. 1 *Valin*, 649, 650. And the English courts, though hesitating somewhat at terming the compensation *demurrage*, hold that the freighter or consignee who improperly detains a vessel, is liable to a special action on the case for the damage resulting from such detention. 9 *Carr. & P.* 709. Courts of Admiralty act upon the rights arising out of

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maritime transactions, without regard to modes or names of actions, and independent of all points of form. The suggestion that demurrage can be claimed upon the footing of express contract alone, is undoubtedly giving too narrow an effect to the term. Every improper detention of a vessel may be considered a demurrage, and compensation in that name be obtained for it. 2 *Hagg. Adm. R.* 317; 9 *Wheat.* 362; 6 *N. Y. Leg. Obs.* 303. Demurrage is only an extended freight or reward to the vessel in compensation of the earnings she is improperly caused to lose. *Holt on Shipp.* Pt. 3, c. 1.

The jurisdiction of the Court over sea freights and demurrage resulting from such voyages, it appears to me, is indisputable, and the branch of the defence resting on exceptions to the jurisdiction is overruled.

I shall accordingly decree against the respondent as owner of the cargo, damages by way of demurrage for the unnecessary detention of the vessel from the 26th of December to the 4th of January.

Various methods of computing these damages are referred to and adopted by the Courts. The *Anna Catherina*, 6 *Rob.* 10; *Holt on Shipp.* 338, § 28; *Abbott on Shipp.* 304; 6 *N. Y. Leg. Obs.* 303.¹ The usual earnings of the vessel in her regular course of employ, is, perhaps, a method not less entitled to adoption than others frequently approved and acted upon. It is in proof that upon average voyages of from fifteen to eighteen days, this vessel was earning at that period about \$10 per day. No doubt that is a low valuation of her worth to the owners, but it may be as safe a criterion to guide the judgment of the Court in estimating the loss they incurred by being deprived of her services that period, as the opinion of witnesses to her charter-value in herself by the month or day. It belongs to the libellants to give satisfactory proof to this

¹ See also the case of *The Rhode Island*, *ante*, 100, and 106, note 1.

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point, and to supply a method of computation by which the Court can ascertain the damages with reasonable precision.

Assuming that as the basis of computation, the detention of the vessel would deprive her of earning, as she was then fitted out, manned, and provisioned, from ten to twelve dollars per day. I shall allow for the nine days' detention one hundred dollars.

Decree accordingly.

CURE v. BULLUS.

The practice of Courts of Admiralty does not admit of a surrender of the principal in exoneration of bail.

In order to be discharged from a bail bond or stipulation given in Admiralty, the party must establish fraud, deceit, duress, illegality of consideration, or other matter such as at law or in equity would avoid a common money bond, or would entitle a party to be relieved from it.

THIS was a libel *in personam* by Peter Cure, assignee of Benson F. Town, libellant, against William A. Bullus, to recover for supplies furnished by libellant's assignor to a vessel owned by respondent.

The defendant was arrested in the cause on a warrant against his person, pursuant to the Rules of the Supreme Court applicable to cases of like description, and one Farnham, a resident of the village of Newburgh, became *fidei jussor*, or stipulator, for the respondent.

Application was now made to relieve the stipulator from his undertaking.

The condition of the undertaking was, that "if the respondent should personally appear before the District Court of the United States for the Southern District of New York, on the 11th day of September instant, at the City Hall in the city of New York, to answer the said libel, and abide by all orders of the Court, interlocutory or final, and pay the money

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awarded by the final decree in the suit," then the undertaking should be void.

It appeared by affidavits read on behalf of the stipulator, that the respondent was arrested at Newburgh by one Brown, a deputy marshal, who, at the time of the arrest, represented that the undertaking was merely for the appearance of the respondent at Court, and that the respondent had twelve days to appear; that the stipulator was thereby deceived and induced to sign the undertaking, which he would not have done had he been aware of his true position under it; that the respondent, his principal, was entirely insolvent and unable to respond to the stipulator in case he was rendered liable on this undertaking; and that Proudfit, an attorney, resident in Newburgh, and who was consulted by the stipulator at the time of signing the undertaking, told him that the marshal was correct in his representations as to the effect of the bond.

It appeared by affidavits read in opposition to the motion, that no instructions had been given to the deputy marshal by the libellant or his proctor to make any such representations; that Proudfit, the attorney consulted by the stipulator, had been present when the latter executed the bond, and had advised him in respect to the matter; and that Proudfit and the stipulator had both of them read over the bond before the execution of it.

The stipulator offered to surrender his principal.

There were two other bonds given under like circumstances in two other causes; in respect to which like motions were also made; all being heard as one.

E. C. Benedict contended, that the Court under its general equitable powers, had the right to relieve the bail from his undertaking in a case like this, where it was evident that there had been, to say the least, a mistake of his liability.

D. McMahon, opposed.

I. The undertaking of the bail in Admiralty is in the

nature of a stipulation for the debt, and he becomes thereby a *fidei jussor* for the principal. Neither the surrender of the principal, nor even the death of the party, can discharge the bail. 2 *Browne's Civ. & Adm. L.* 412; *Hall's Adm. Pr.* 25, note.

II. The representations of the deputy marshal were not directed to be made by the libellants, and they were nothing more than the representations of a third party. The libellants, consequently, are not bound by them.

III. It appears that the stipulator read the conditions of the bond, which were plain and easy to be understood. He cannot complain of a mistake which has happened through his own carelessness.

BETTS, J. The defendant moves that three bail bonds, entered into by him and one Farnham to the marshal of this district, be vacated, or that the bail be relieved therefrom on the surrender of the respondent to be committed in the respective suits.

The respondent was arrested on the 10th day of September last, at Newburgh, upon three warrants *in personam*, returnable in this Court on the 11th of September, and on the same day gave the bonds in question to the marshal.

The condition of each bond is made conformable to Rule 3 of the Supreme Court; and is, that the respondent, Bullus, "shall personally appear before the District Court of the United States for the Southern District of New York, on the 11th day of September instant, at the City Hall of the city of New York, to answer the said libel, (the filing of which is previously stated, together with the cause of action,) and abide by all orders of the Court, interlocutory or final, and pay the money awarded by the final decree of the said Court," &c.

The bonds were duly signed and sealed by the respondent and his bail, and thereupon he was discharged from arrest in the three suits. The bonds, (except names of parties, dates,

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and the sums of money in demand, \$52.97 in one, \$246.69 in one, and \$49.50 in the other, with designation of the particular cause of action in the respective suits,) are in print.

The respondent, by his own affidavit, sets up in avoidance of the bonds, that he inquired of the deputy marshal who served the warrants, what the effect and obligation of the undertaking was, and the officer informed him and his bail that it was nothing more than to secure the personal appearance of the respondent, who had twelve days after the return day of the process to come into Court and perfect his appearance in the cause. The bail swears to the same statement of facts, and asserts that he subscribed the bonds in reliance upon those representations, and he would not have undertaken for the debts.

A lawyer in the village of Newburgh was consulted by the principal and bail before the bonds were executed, who says he questioned the deputy marshal, and was informed by him that the respondent had twelve days after the return day of the process within which to enter his appearance, before judgment would be entered against him, and that by signing the bail bonds the bail would become liable no further than for the appearance of the defendant; and upon that information deponent told the bail he would be safe in signing the bonds. The attorney further swears that he is not a proctor of this Court, or familiar with its practice, but in glancing over the bail bonds, he was of the impression that the obligors were only bound for the appearance of the defendant, and he so informed them. He further says, he is counsel for the respondent, and knows his affairs intimately, and that he is entirely insolvent.

An affidavit of the deputy marshal is also added, stating that he supposed a defendant had a certain number of days to enter his appearance after the return day of the writs, and so represented it to the defendant and his bail, in good faith,

and solely for the purpose of giving them information to which he supposed they were entitled.

After the above papers were served and notices of the motion given, the deputy marshal drew up a statement in his own handwriting, and made oath to it, detailing with more particularity the representations he made on the subject. He says he had no conversation at all, he believes, with the bail, who began signing the bonds as soon as he came into the room where the parties all were, the attorney reading over to him a part of the bond while he was in the act of signing. That the attorney inquired of the witness what was the meaning of return day of the warrants, and whether the defendant had not some days after that to enter his appearance, and if it was not twelve days. The witness answered that he was new in the business and could give no certain information, but he supposed that was the effect of the undertaking, although he could not say that it was twelve days to which the party would be entitled; and that he did not attempt to give any advice or certain information on the subject. It was a casual talk with the lawyer and deponent, and he certainly did not intend to mislead any of the parties. The attorney intimated that he understood the nature of the undertaking, and said he thought time was given the respondent after the return day, and that the time was twelve days.

The effect of the application upon these facts is, that the bail be now allowed to surrender the principal, to which the principal assents; or, that he be discharged from the bonds as having been executed by him under an entire mistake, induced by the deputy marshal, of the nature of their obligations.

The Admiralty practice does not admit of a surrender of the principal in exoneration of bail. The appearance of the party arrested, which the bail stipulation guarantees, is not for the purpose of having the person of the respondent present to satisfy the final decree of the Court. It is to secure his

attendance to submit to interrogatories or sanction intermediary proceedings to which his concurrence may be necessary in the progress of the suit, or to put in and perfect the bail for the respondent, which the stipulation in the arrest may be only preliminary to. *Clarke's Praxis*, tit. 4, 5, 12; 1 *Browne's Civ. & Adm. L.* 256; 2 *Ib.* 361, note. In maritime courts, the stipulation and the appearance of the party is denominated *prætorian*, that is, an undertaking to the Court, and not to the adversary party. *Clarke's Praxis*, tit. 9; 2 *Browne's Civ. & Adm. L.* 355, 357. But when bail by bond or stipulation is given, the obligation imposed on the *fidei jussores* is *judicatum solvi*; that is, to see the costs and condemnation paid at all events, (3 *Blackst. Comm.* 292; *Hall's Adm. Pr.* 12, 29; 2 *Browne's Civ. & Adm. L.* 356,) and this obligation enures to the creditor or actor as an absolute security for his debt. *Wood's Civ. L. Bk.* 3, c. 3, § 2. In our practice, this obligation may be entered into on arrest. *Sup. Ct. Rules*, 3. This undertaking is not discharged or affected by the surrender of the principal bodily, as in common-law actions, (*Hall's Adm. Pr.* 25, note; 2 *Browne's Civ. & Adm. L.* 412; *Conkling's Adm. Pr.* 458,) and it matters not whether the obligation is assumed on the arrest by bond, or on appearance in Court by way of stipulation. In the sense of the common law applicable to bail, the bail in Admiralty are absolutely fixed from the time the bond or stipulation is entered into. There is no alternative in the undertaking, as at common law, which being performed acquits the obligation. Nor will the bankruptcy of the parties, or laches in prosecuting the suit, discharge the bail. *The Vreede*, 1 *Dods.* 2; *The Harriet*, 1 *W. Rob.* 195. The stipulation rests on the doctrine of principal and surety in positive contracts, and is governed by the rules of law and equity applicable to those contracts, (*The Harriet*, 1 *W. Rob.* 197,) with the additional consideration, that as the undertaking is not only to satisfy the action but to abide the adjudication of the Court in the matter, it is entitled to a

more enlarged consideration in Admiralty than at law, and when given as a substitute for the thing arrested, may be enforced beyond the mere money amount recovered by the promvent. The *Nied Elwin*, 1 *Dods*. 50.

In asking a discharge, therefore, from a bail bond, the parties must, in Admiralty, place their claim upon the same footing as if the release sought was from a money bond of any other denomination and absolute in its terms. Fraud, deceit, duress, or illegality of consideration, or some matter showing the obligation void *ab initio*, or rendered inoperative by something subsequently occurring, must be established to affect its validity.

Courts of Admiralty are governed by equitable principles, (2 *Woodb. & M.* 60,) but equity will not cancel an obligation because the contracting party misapprehended the extent of his liability under it, unless he has been misled by the acts or declarations of the one benefited by it. Mistake in the law resulting from the inattention or ignorance of the party bound, will not be regarded in equity as a reason for avoiding a contract. 1 *Story, Eq. Jur.* §§ 111, 113; 6 *Johns. Ch. R.* 169.

Here there can be no reasonable ground for alleging a mistake or misapprehension of any facts connected with the transaction. The bail bond received by the parties, stipulated that the respondent should appear in Court on a day designated, and that the stipulators would pay the money awarded by the final decision of the Court. These two facts were directly brought home to their notice, at least the evidence that they were so must be regarded as conclusive against the obligors. The mistake and ignorance alleged in their behalf then is, that they did not understand the legal effect of their contract, and supposed it was limited to the personal appearance of the party in Court. Even if this excuse rested upon an engagement complex or equivocal in its terms, there would be great difficulty in bringing it within any recognized principle of Courts of Equity, affording relief to obligors against

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their contracts. But when the stipulation is explicit and plain, and the mistake set up is, that the interpretation given the contract by others, and not the words themselves, was confided in, the whole reason for interference of equity is taken away.

It must, moreover, be considered that the misapprehension asserted here, was no way induced by the libellant or his proctor. Neither was present when the bond was executed, nor had taken any part in bringing the obligors into the agreement. It was wholly voluntary with them, and sought for independent of his concurrence or knowledge. Nor were the representations of the deputy marshal, in fact or law, chargeable upon the libellant.

If that officer had chosen to say the bail bond was an idle formality, that the respondent was not in law bound to give bail, that the Court would cancel the bond on its presentation before them, and that no liability whatever could be incurred by the bail in signing it, such representations, however confidently accepted by the obligors, could never in law or equity operate to release them from their formal signature and execution of it. In any such suggestions the deputy could not be acting officially, or as agent of the libellant, and both as to him and the marshal, and as to the respondent and bail, he would be a mere stranger making representations upon his individual responsibility alone. His representations, however, if erroneous, it is conceded, were made innocently and from ignorance on his part, and with no purpose to mislead the respondent or his bail. Misrepresentations of that character, even if made by an agent empowered to form a contract, do not invalidate the engagement as to his principal; (*Early v. Ganet*, 9 *Barnw. & C.* 928; 17 *Eng. Com. L.* 522; *Cornfoot v. Fowke*, 6 *Mees. & W.* 358;) more especially, if his principal is innocent of any misstatement or concealment leading to the contract.

The deputy marshal, after making the first deposition, drew

up in his own handwriting a more detailed and explicit statement of the part he took in the transaction, and it certainly would appear from this amended oath, that he all the while gave the attorney and party who referred to him, to understand he had no knowledge of the practice of the Court in this respect, and merely coincided with suggestions made to him by the attorney, that the undertaking of the bail was not absolute, and said nothing with intent to persuade or incline the parties to sign the bonds; and that the attorney seemed satisfied with his own construction of the bonds, and his impressions of the practice of the Court, and that the bonds were signed in pursuance of his advice and assurance, and not upon any representations of the deputy.

Without placing this decision upon the facts put forth by the respective affidavits, as to the conversation with the deputy, I hold that no deceit or misrepresentation is proved, which in law or equity entitles the obligors to be relieved from the bonds; that the undertaking of the bail is absolute and not conditional, and cannot be discharged by producing the principal in Court. He stands before this Court on these bail bonds, precisely as he would at common law, or on his recognizance on the lapse of eight days after the returns of the *capias* against him, absolutely responsible for the judgment. 1 *Johns. Cas.* 329, 334; 2 *Ib.* 483; 2 *Johns.* 101; 9 *Ib.* 84; 1 *Tidd's Pr.* 620.

The motion does not raise the question whether the libellant is entitled to exact bail in these cases. That matter will more properly come up when an attempt is made to enforce the bonds; or it may be presented on a distinct motion to the Court. As the case stands, and upon the assumption that the respondent was bound to give bail, I am compelled to say, no authority exists in this Court to interfere with the rights acquired by the libellant under the respective bail bonds executed in these causes, and the motion must therefore be denied.

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The parties having acted in good faith in making this application, and as it presents a new point of practice, I shall not order costs. *Order accordingly.*

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No claim for salvage can be maintained by the crew of a vessel upon the ground that, by their services she is brought through a storm into port, sound in hull.

An action for compensation for salvage services rendered to a vessel, cannot be maintained *in personam* against the master, unless it was performed for his benefit.

A mariner who ships "by the *run*," takes the risk of adverse weather and of other kindred accidents attendant upon maritime enterprise; and if the vessel be driven out of her course by stress of weather, and obliged to take shelter in an intermediate port, and is there detained, the seaman has no claim for additional compensation for extra services thus required.

Where a seaman ships "by the *run*" or "by the *voyage*," the vessel, although detained at an intermediate port by stress of weather, is bound to maintain him while he remains attached to her, whether his services are useful to her or not.

THIS was a libel *in personam* filed by William Miller against James Kelly, to recover compensation for services rendered on board the respondent's vessel.

In December, 1848, the libellant shipped at Boston on board the brig W. T. Dugan, of which the respondent was master, for a voyage to New York. He shipped as mariner, and engaged "for the *run*," at \$18, which sum was paid him in advance.

The brig, on the voyage, encountered a gale off Martha's Vineyard, in which she was much injured. She put into Nantucket in distress, and there remained for about three weeks, at the end of which time she was towed on to New York by a steamer sent on for the purpose.

Other facts are stated in the opinion of the Court.

The libellant commenced this action to recover compensa-

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tion for the extra services rendered by him to the ship during the storm, and during the detention of the vessel at Nantucket. He claimed to recover either by way of salvage, or on a *quantum meruit* for such services as being extra his contract.

E. C. Benedict, for the libellant.

I. The voyage for which the libellant shipped was the usual direct "run" from Boston to New York, a well-known voyage of safe navigation, from three to six days long—a mere passage from one city to the other. This alone was in the minds of the parties, and on this alone their minds met. If, without the fault of the seamen, this voyage, or run, was deviated from or rendered impossible, whether by accident or design, it was at the risk of the master, who alone controls the voyage. In such case, the men are entitled to a *quantum meruit*. If the voyage is thus made longer in time or distance, whether the hindrance, departure, or extension occur at either end, or at an intervening port, (not in the run,) the wages are to be increased *pro ratâ*. *Laws of Oleron*, art. 19; *Cleirac*, Oleron, 64, notes 1 and 2; *Curtis on Merch. Seam.* 63.

II. The libellant's demand is as equitable and just as it is legal. Where seamen have encountered great peril in saving their own wrecked vessel, maritime courts are inclined to allow them something in the nature of a salvage *quantum meruit*, but usually in the name of wages. They are not held to be excluded from their wages by rules which, literally construed, would seem to exclude wages.

F. F. Marbury, for the respondent.

BETTS, J. The libellant, in December, 1848, hired himself to the respondent at Boston, as a mariner on board the brig W. T. Dugan, for a voyage to New York, for the sum of \$8 for the run. That sum was paid him in advance. This method of hiring was familiar to the ancient marine law. *Jacob. Sea L.* 133. It is substantially superseded in modern practice by contracts for monthly wages. *Ib.*; *Curtis on Merch.*

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Seam. 62, 63. But the obligations in the two cases are equivalent, being an engagement to perform the voyage named.

The vessel, on her regular course, encountered a gale off Martha's Vineyard on the 2d of January, at 3 A. M., which continued until half-past 3 A. M. of the next day, blowing violently from the N. W. The anchors were thrown over without effect; the cable parted, and the main anchor was lost, when both masts were cut away, in order to check the driving of the vessel. She was shortly after brought up by the kedge anchor. In falling, the masts stove a hole in the long boat. The brig came to about five miles east of Cape Pogue. The wind continued N. W., and a light spar was obtained and rigged as a jury-mast; the kedge hawser was cut, and the brig put before the wind for Nantucket, where she arrived, grounding while working into the harbor, and was then towed in by a steamer. The weather was severe and freezing during the efforts to make harbor, and ice made over the decks, rigging, &c. She remained in Nantucket about three weeks, and was then towed to New York by a steamer sent to her for that purpose.

The libellant claims compensation for the time he was thus detained, by way of salvage for assisting in saving the vessel, or as a *quantum meruit* for his services during the delay of her voyage.

The claim for salvage cannot be sustained. *The Neptune*, 1 *Hagg. Adm. R.* 237; *The Branston*, 2 *Ib.* 3, note; 10 *Pet.* 110; *Hobart v. Drohan*, 3 *Kent*, 246. No services were rendered by the seaman beyond what were required of him by his duty to the ship. He was bound to the hazards of the voyage, and to bestow his best efforts for the preservation of ship and cargo. Detentions through perils and disasters of the sea, are risks assumed by seamen in every shipping contract, and no legal right arises to them from those causes, or their extra exertions to save their vessel, to demand an increased compensation. *Abbott on Shipp.* 647. The vessel was not a

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wreck, out of which, by his special exertions, a portion of her tackle or of her cargo has been preserved. She came bodily into port, sound in hull. No claim for salvage can be raised by a crew against a vessel so circumstanced. 3 *Kent*, 367. And even if such claim might be enforced *in rem* against the hulk, as a remnant of the entire ship, the demand could not be maintained *in personam* against the master without proof that the salvage service was performed for his benefit. *Sup. Ct. Rules*, 19.

The claim for continuing wages on a *quantum meruit*, is pressed upon the consideration, that the libellant engaged for a continued run or voyage to New York, and that by putting the vessel back off her course, the respondent committed a deviation which entitles the libellant to pay for his time intervening up to the arrival of the vessel in her port of destination.

It cannot be maintained that returning to Nantucket from the anchorage of the brig was a voluntary deviation. There was an imperative necessity that something should be done for the preservation of the vessel and her crew; and, in her crippled condition, nothing else could be attempted so safe and serviceable to both, as to reach that harbor. The measure was compelled by stress of weather, and the absolute exigencies of the vessel and her crew. The libellant could not claim a guaranty of fair weather and a swift run. He took the risk of adverse winds and all accidents incident to maritime voyages. Had the ship been driven on shore, or on a rock, or imbedded in ice, and detained thirty or sixty days, the misfortune would have been part of the risk he assumed in undertaking the voyage. He engaged to perform the voyage: and the fair and reasonable interpretation of the contract is, that he is to stay by and aid the ship in accomplishing it, so long as she can be *bonâ fide* employed in its performance. In all the books, *shipping by the run* is considered equivalent to shipping for *the voyage*. *Curtis on Merch.*

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Seam. 63, and authorities cited. In each case the seaman is bound to the vessel so long as she continues on the *iter*; and her being driven from a direct course by distress, or going voluntarily off it for shelter or repair, in no way relieves him from his contract.

Should it happen on a hiring for a voyage to Europe, that the ship was compelled, *ex necessitate*, to make harbor in Bermuda, the Western Isles, or Madeira, and be detained a period longer than the usual transit to her port of destination, the seamen would not thereby be released from their obligation to continue to the termination of the undertaking.

The obligation between the parties is reciprocal. The ship is bound to support the crew whilst they remain with her, although their services may be of no value to her, and, as in this case, to continue them on board to the port of their discharge, should the vessel be conducted there wholly independent of their assistance.

I do not discuss the question as to the right of the libellant to demand his discharge at Nantucket, when it was found the vessel must remain there to be repaired, or until she could be towed by a steamer to New York. He made no such request. It was probably most to his interest, in a place so separated from intercourse with other ports during the winter season, to remain with the vessel and be maintained at her expense. Whilst he did continue with her and she was engaged in providing means to complete her voyage, and during its completion, he must be regarded as acting under his contract, and can be entitled to claim no more than the stipulated wages.

I shall, therefore, pronounce against the demand, but, as there is color of equity in his claim, and it does not appear to be presented vexatiously, I shall not impose costs on him.

Libel dismissed without costs.

BRADLEY v. BOLLES.

Work done upon a vessel in the dry dock, in scraping her bottom preparatory to coppering her, is not of a maritime character ; and compensation for such labor cannot be recovered in a Court of Admiralty.¹

THIS was a libel *in personam* filed by John Bradley against one Bolles, master of the ship William B. Travis, to recover for work done in scraping and cleaning the hull of that vessel.

It appeared that the respondent's vessel being in the dry dock for repairs, the libellant was employed by the respondent to scrape her bottom, clear it of barnacles, &c. This work was necessary to prepare the vessel to be coppered. The work having been done, the libellant brought this suit to recover the price agreed on therefor.

The respondent objected that the Court had no jurisdiction over such a demand.

Alanson Nash, for the libellant.

W. R. Beebe, for the respondent.

BETTS, J. The services for which the libellant claims to recover in this suit, were not rendered in putting repairs upon the ship, or in doing any thing towards her betterment, which was to continue and run with her. Her bottom was to be scraped and cleared from mud and barnacles. This was shore work, requiring no mechanical skill, and is ordinarily performed by mere laborers, and has no more the character of a maritime service than sweeping or washing the bottom or deck of a vessel would have. Neither the marine law or State statute creates a lien upon a vessel for menial services of that character. The contract or service did not relate to

¹ Compare the cases of *Cox v. Murray*, *ante*, 340 ; *Gurney v. Crockett*, *ante*, 490.

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repairs put upon the vessel, or any betterment attached to her and promoting her safety or navigation. Both were preliminary to the reparation intended to be put upon her. Removing impediments to that work by cleaning her bottom, was of the same class of service as taking out of the way any other kind of obstruction to the work, and contains no ingredient raising it in law above the quality of common work and labor. This Court has repeatedly held, that contracts of that description do not constitute a lien upon vessels which can be enforced in Admiralty. The Amstel,¹ (MSS.) March, 1831; The Bark Joseph Cunard,² (MSS.) April, 1845; The Ship Harriet,³ (MSS.) December, 1845. *Libel dismissed.*

McGINNIS v. CARLTON.

Although the libellant, in his libel, claims a sum exceeding \$50, yet if upon the hearing he admits that an amount less than that sum is all that is due to him, and claims to recover only such lesser sum, he can recover only summary costs on a decree in his favor.

The cause would not be appealable to the Circuit Court in that condition of the demand.

This Court does not tax plenary costs when the sum in dispute does not exceed \$50, although the proceedings are plenary.

THIS was a libel *in personam* filed by John McGinnis, against Henry Carlton.

The libellant, in his libel, advanced a claim for \$55. On the hearing before the Commissioner, to whom the cause was referred, the respondent claimed a deduction of \$10, the propriety of which was admitted by the libellant. The claim, as litigated before the Commissioner, was thus reduced to \$45

¹ Since reported, 1 *Blatchf. & H.* 215.

² Since reported, *Olcott*, 120.

³ *Ib.* 229.

only. Upon that claim the libellant prevailed. On taxation of costs, however, plenary costs were taxed in his favor, on the ground that the amount of his claim, proceeded upon by the libel, exceeded \$50.

The respondent now appealed from this taxation.

W. Newton, for the appellant.

F. C. Bliss, for the respondent.

BETTS, J. I think this case was clearly one of summary character. It was not appealable to the Circuit Court. Act of 1803, 2 *U. S. Stats.* 244.

The *matter in dispute* between the parties was less than \$50. Rule 165 must be construed in subordination to the terms of the statute, as its design was to operate on those cases which were not appealable under the act.

The Supreme Court holds that a plaintiff *may* appeal or bring error, when his suit is for an amount above the limited sum, whatever may be the recovery. *Gordon v. Ogden*, 3 *Peters*, 33. That is justly so, when the Court adjudge *in invitum* against his demand. But it seems to me that all the determinate character of the libel is taken away, if the libellant himself, on the hearing, admits his claim to be less than \$50, although he has put it nominally above that sum in his pleading. It would be sanctioning a measureless abuse to permit parties to encumber, with plenary costs, suits for the most trifling sums by alleging a demand exceeding fifty dollars, when the claim he brings before the Court as his actual demand is below that sum.

Congress manifestly designed that the decisions of the District Court should be final in cases where the disputed matter was only \$50, and not to allow appeals on claims exceeding originally that sum, but which the libellant conceded, on the hearing, had been reduced below it by payments before his action was brought. An appeal does not lie when the matter in dispute is not \$50.

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If the libellant, on the trial, had persisted in the demand in his libel of \$55, and the Court had allowed the respondent a charge of \$10 against the demand, he might, undoubtedly, take the case to the Circuit Court, by appeal, to have that judgment rectified. But here, all the proceedings in Court show that the real demand in dispute was \$45 alone, and the Court cannot be blinded by a formality in pleading, to give an advantage to the libellant in the matter of costs, which the judgment he asked and received, demonstrates he is not entitled to. Had the cause been allowed, on the technical frame of the libel, to go into the Circuit Court, it would, undoubtedly, be regarded as cognizable there only to the end of punishing the libellant by the infliction of costs, for intruding into that Court a demand only disputable in the Court below.

Congress has appointed no tariff of fees for the government of Admiralty Courts.¹ Those tribunals regulate that subject at their discretion. This Court directed, by Rule 165, that proceedings herein for the recovery of matters in dispute, not exceeding \$50, may be *summary*; and by Rule 176, that in causes of that character, the proctor and advocate shall not be allowed to tax over \$12 costs. This limitation justly applies, although the form of procedure be made plenary, when it is made manifest to the Court that the action is rightly a summary one. In this case the libellant made up and claimed a bill of costs for a litigation in a plenary action, and the taxing officer allowed it to him. From that taxation the respondent appeals. I consider the allowance unauthorized in law, and overrule it. The bill must be retaxed at \$12, the amount limited in a summary action.

Order accordingly.

¹ See note to *Simpson v. Caulkins*, *ante*, 545.

ALLEN v. HALLET.

The master of a vessel is entitled to call upon the ship's cook to perform service as a seaman, so far as he possesses the requisite experience and ability.

Where a seaman deserts from the vessel while in port, and another hand is shipped in his place, and he afterwards returns and secretes himself on board, and is discovered by the master after the ship has left port, the master is entitled to call upon him to perform any service as seaman which may be within his ability; but is not entitled to assume that he is an able seaman, and to require him to do duty as such.

In an action brought against a master by a seaman found secreted on board and ordered to do duty and punished for refusal, to recover damages for the punishment inflicted, it is imperatively incumbent on the master to prove, in order to justify the punishment, that before giving the order he informed himself as to the seaman's experience and capacity, and ascertained that he was able to perform the work required of him.

THIS was a libel *in personam* filed by James Allen against Franklin Hallet, master, and George Gibson, first mate of the packet-ship *Queen of the West*, to recover damages for ill usage inflicted on the libellant, on board that vessel.

The facts are stated in the opinion of the Court.

Alanson Nash, for the libellant.

O. Sturtevant, for the respondents.

BETTS, J. This is an action of tort against the master and first mate of the packet-ship *Queen of the West*, for confining the libellant in irons in a painful position and posture on board the ship, and putting him on insufficient allowance of food, on her voyage from Liverpool to New York.

The libellant shipped at New York as cook on board. His conduct in that capacity was unexceptionable. At Liverpool he had no duty to perform as cook, and he was ordered by the mate, and the order was confirmed by the master, to go over the side of the ship with others of the crew, and standing on a staging prepared for the purpose, or on the dock against

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which the ship rested, to assist in scrubbing down her sides. This was a necessary service to be performed by the crew. The libellant refused to obey the order, alleging it was not his duty. He stated his willingness to perform any seaman's duty on deck. He was ordered to perform that particular service or that he should not be fed by the ship. He and the second cook thereupon went ashore; the second cook deserting the vessel, and the libellant remaining ashore without leave until the ship sailed.

Just before the ship sailed a first and second cook were shipped in the places of the others.

When the ship got out to sea the libellant was found on board. The answer alleges that he entered surreptitiously without the knowledge of the officers. No proof is made of the fact, nor does the libellant show when or how he returned to her. His place was, however, occupied by another cook, and he does not appear to have been at first recognized or admitted by the officers as one of the ship's company.

When four or five days out from Liverpool he was ordered with other men to go over the side of the ship, in fine weather, and scrub her. This order is alleged, by the libellant, to have been given by way of punishment, and was only applied to him and one other man. On that point the testimony is in disaccord; some witnesses swearing that only one man was put to the duty, and others, that two or three men were so employed. So the answer asserts, and the fair weight of evidence may be regarded as supporting it, although the point is not clear, nor is it of sufficient importance to render its particular examination and discussion necessary.

The libellant refused to obey the order. This he did peremptorily to the captain, and with coarse and insulting language, and therefore he was gagged for a few moments, and handcuffed, and so kept for several days; during the daytime, when fair, on the after-deck, and at nights in the wheel-house; and until, as the answer asserts, he submitted, and consented

to go to duty on board. On the second day after he was handcuffed, a bolt was put in his mouth as a gag. The witnesses saw it there for a few minutes, but were unable to say who put it in or for what cause.

After his confinement terminated the libellant was restored to his place, and performed the duty of cook to the arrival of the ship here.

It seems to me that the case, stripped of the inflamed and reproachful terms in which the parties speak in their pleadings, is to be disposed of upon these considerations:—

Was the libellant, after placing himself in the ship without the authority of the master, entitled to claim his former position? and if so, was he bound to do ordinary ship's duty when not on service in the capacity of cook? If the order of the master to the libellant to perform that duty, was a recognition of him as one of the crew, was any inexcusable violence or severity applied by his orders, in bringing the libellant to obedience?

In respect to the first mate, Gibson, there is no color of evidence implicating him beyond the act of applying the handcuffs on the libellant, under the orders of the master. This was not done with harshness, or so as to cause needless pain or suffering to the libellant. In that, and in confining the libellant subsequently, he only pursued the directions and orders of the master, which were a sufficient justification for his acts. *Butler v. McLelland, Ware, 219.*

The libel, therefore, as to him, must be dismissed with costs.

Had the master, then, rightful authority to impose those services on the libellant, and compel his submission to them?

I perceive no reason to question his power in respect to the orders given at Liverpool. 3 *Pet. Adm. R.* 368; *The Elizabeth Fritz*,¹ (*MSS.*) 1831. His command is supreme in the

¹ Since reported, 1 *Blatchf. & H.* 195.

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navigation and management of the ship at sea. This necessarily includes the employment of the crew, subject only to his responsibility to the men for any tortious or oppressive conduct towards them. A cook ships and rates as a seaman, except as to wages. He signs the articles, and designates himself as such; he commonly is a sailor, and not unfrequently acts in the double capacity of sailor and cook on the voyage, being only rated at higher wages because of that quality. He has also the privileges of a seaman, as to remedy against the ship for his cure in case of sickness, and his protection abroad if left by the vessel, (*Turner's case*, 1 *Ware*, 83; *The Louisiana*, 2 *Pet. Adm. R.* 268,) and he may be removed, for reasonable cause, from the particular employment of cook and assigned to the common duties of a sailor. This is so even in respect to sub-officers, (*Shermond v. McIntosh*, 1 *Ware*, 109; *Mitchell v. The Rogambo*, 1 *Pet. Adm. R.* 250; *The Ship Mentor*, 4 *Mason*, 102,) and the cook, if he is entitled to any special designation of rank or privilege distinguishing him from a common sailor, he can be only so upon the terms of his contract, limiting his obligation to perform that particular service. The law will secure him the benefit of such special agreement, so long as he observes it with fidelity and intelligence, subject always to the rightful authority of the master to regulate the discipline and service of the ship at his discretion.

When the orders were given at Liverpool directing him to do other duty, the libellant was not acting as cook; there was no duty for him to perform in that capacity; this employment was not taken from him; but when idle, and the state of the ship required his assistance, he was directed to aid the crew in a piece of seaman's work about the ship. He did not question his obligation to obey any order to render services *on deck*, but puts his refusal on the assumption that he could not be required to go over the ship's side. I see no reason for this distinction. He does not show he would be exposed to risk, in standing on the staging or the dock, nor that he was

to be placed in a situation requiring experience and skill he did not possess. Whether the labor of scrubbing was then to be done on the deck or sides of the ship, in the dock, cannot, in this case, make any distinction as to his obligation to perform it.

I hold, under the facts in proof, that the libellant was bound to obey the orders given him in Liverpool, and that his refusal was refractory and mutinous, and would have justified his punishment by forfeiture of wages, or by personal coercion.

The libellant then abandoned the ship. The manner of his getting on board and to sea is not disclosed by the proofs. It is manifest, however, that he did not come back to her with a claim to his place of cook, rendering himself to the officers to perform that duty. The place had been filled by another person. The first time when he appears to have been noticed on board by the officers, was when the order was given him to go over the side and assist one or more of the men in scrubbing the ship. The ship was then some days out; according to some of the testimony two days, to others, four or five days.

The relationship between the respondent and libellant was never changed. It has been held in this Court, that a seaman who had abandoned his ship in a foreign port, could not, by joining her clandestinely after his place on board had been supplied, acquire the right to restoration to it or to wages. *The Ship Philadelphia*,¹ (*MSS.*) December, 1845. If any new agreement is to be inferred from his being in the ship and the exercise of authority over him by the master, it is, that he should render such services as might be demanded of him and what he was capable of performing.

The master would have no right to assume from his acting as cook on board that he was an able seaman, and compel

¹ Since reported, *Olcott*, 216.

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him to go aloft, or take the wheel, or engage in work requiring professional skill and involving personal hazard. He must first inform himself of the libellant's capacity, and then most properly he might expect of him any reasonable service within his ability to render. The libellant proves, that when he refused to go over the sides of the ship on the staging, he offered to do any work on the ship's deck. The master gives no evidence that his experience or capacity qualified him to venture safely on a staging at sea whilst the ship was under way. I think it was incumbent on him in order to justify such order and the infliction of punishment by way of close confinement on board for disobedience of it by libellant, to prove the man possessed experience and capacity enabling him to fulfil the order with safety. In my opinion, the master in this act transcended his reasonable and rightful powers. He could no more enforce the orders against the libellant, on the facts in evidence before the Court, than he could have done to any man found on board not shipped as one of the crew. And even if he claimed authority over him under his broken contract, he was bound to inform himself whether a man who shipped as cook, and had only served with him as such, was also competent to perform the duty of a seaman, before imposing on him any service apparently hazardous, and which might involve danger to his life.

The wrongful conduct of the libellant at Liverpool, no doubt conduced to the harsh proceedings adopted by the respondent at sea. The libellant was afterwards restored to his first position as cook on board, and spoke to his companions of this transaction as of no importance, and said he should take no further notice of it; and though the Court is compelled to pronounce in his favor that a tort has been committed, yet it cannot be regarded one aggravated by any manifestation of vindictive feelings or cruel purpose on the part of the respondent.

In view of the antecedent misconduct of the libellant in the

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same particular, and the apparent reconciliation between the parties, in his restoration to his former place, and it is to be assumed the payment of full wages to him out and home, as he claims no balance of wages, I shall decree him damages against the respondent, Hallett, only to the amount of fifty dollars and costs, for the improper imprisonment and treatment to which he was subjected. *Decree accordingly.*

MARTIN v. WALKER.

The general course of Admiralty procedure in this country requires a *sworn* libel as the foundation of any process of arrest of person or property.

When a libel is verified by an attorney in fact of the libellant,—as in case of the libellant's absence, &c.,—it is not necessary that the authority of the attorney to act should be made to appear when he attests the libel or files it; it is enough if he establishes such authority when it is called in question.

A mere general employment as proctor or attorney at law to prosecute a demand in a Court of Admiralty, is not sufficient to authorize the party employed to verify a libel as attorney in fact of the libellant.

No action can be maintained in a Court of Admiralty by one ship-owner against another to collect a balance to be determined in favor of the libellant on the settlement of the joint accounts of the parties.¹

In holding a respondent to bail, a Court of Admiralty will be governed much by the equitable considerations of the case.

Accordingly, where a libellant procured the arrest of respondent in a suit brought in a district different from that in which they both resided, upon a stale demand, of small amount, and which was already in litigation between the parties in the Courts of the State in which they dwelt,—*Held*, that the respondent ought to be discharged from the arrest.

A motion to set aside an arrest, founded on irregularity in the libellant's proceedings, is not within Rule 25 of the Circuit Court, and will not be denied of course, merely because it was not made at the earliest day practicable after the arrest.

¹ Compare the case of *Duryee v. Elkins*, *ante*, 529, where it is held that Admiralty has not jurisdiction to take an account of the profits of the voyage and determine the share due to a seaman employed on a "lay" or share of the proceeds.

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THIS was a libel *in personam* filed by Mulford M. Martin against Lewis M. Walker, to recover for supplies and materials furnished to vessels of the respondent.

The cause now came before the Court on a motion to set aside the arrest of the respondent, and discharge the recognizance of bail given by him.

The facts involved appear in the opinion of the Court.

Scoles & Cooper, and *E. W. Stoughton*, for the motion.

Beebe & Donohue, opposed.

BETTS, J. The defendant moves to set aside his arrest in this cause, and that the recognizance of bail given by him therein for the limits, be discharged.

Both parties are residents of the District of New Jersey, and were such when this suit was instituted. On the 2d of August last, a libel *in personam* was filed, demanding of the defendant the payment of about \$2,700, for supplies and materials furnished by the libellant to two vessels alleged to be owned by the respondent. The account is of long standing, the advances to the schooner Copper having been made more than ten years since, and to the schooner Roanoke between the years 1836 and 1841.

The libel alleges that supplies to the amount of \$13,000 were furnished to the Roanoke, of which sum there yet remains due and unpaid about \$2,150, besides interest, and in like manner to the schooner Copper to the amount of \$139.

The respondent in his affidavit swears that the libellant was part owner with him of the schooner Roanoke, and that whatever supplies were obtained for her were furnished on account of the joint owners, and not for him individually. He further asserts that the charges in respect to the Copper, passed into the subsequent account in relation to the Roanoke, and have been adjusted between the parties in that account, and upon the merits of the case avers that he is not indebted to the libellant, but that a balance is due him on their transactions.

It is moreover stated that the whole subject-matter is now in litigation between the parties on cross-bills filed by them respectively, in the Court of Chancery in the State of New Jersey.

Five objections to the plaintiff's right to maintain this action are taken.

That the libel was not authenticated according to the requirement of the rules of this Court, and that the process of attachment issued thereon was irregular.

That no such affidavit of debt was made by the libellant as would entitle him to hold the respondent to bail in the suit.

That one part owner cannot sue another in Admiralty to recover advances made for their joint benefit.

That the demands are stale, and if not actually barred by the statute of limitations, yet the Court of Admiralty will not give a party in such case the advantage of an arrest and imprisonment of the debtor on mesne proofs.

That the voluntary selection of a home tribunal by the parties, for the litigation of these claims, precludes both from arresting each other out of that jurisdiction on the demands.

1. The attestation to the libel is made in the name of the libellant "*by C. Donohue, his attorney,*" and in the jurat it is stated, that "*the libellant is sick, and absent from the district, and could not swear to the libel,*" and the commissioner certifies that Donohue appeared before him, "*who signed the libel as attorney in fact for the libellant.*"

For the respondent it is insisted that no fact is made to appear on this jurat authorizing the authentication of the libel otherwise than by the oath of the party himself, and that no arrest can be made of a party unless a libel regularly attested on oath is previously filed.

The general course of Admiralty practice here unquestionably requires a sworn libel as the foundation of any process of attachment, (*Benedict's Pr.* § 413; *Dunlap's Pr.*, 2d ed.,

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126-128; *Betts's Pr.* 22, 23; *Conkling's Pr.* 423,) although the affidavit which justifies the arrest need not, it would seem, be made on the libel, but may be a separate deposition. *Sup. Ct. Rules*, 7. Such was the practice in the English Admiralty, as the warrant of arrest issued previous to filing the libel. *Clarke's Pr.* tit. 1 and 19; 2 *Browne's Civ. & Adm. L.* 410, 411, 432, 434.

The rule of this Court requires the verification to be in the libel itself. *Rule 3.* This oath must be made by the party himself, (*Rule 4*), unless the libellant is absent from the United States, or resides out of this district, and more than one hundred miles from the city of New York, (*Rule 93*), in which cases it may be made by an attorney in fact or proctor. *Ib.*

In the present instance the libellant's residence was out of the district, but less than the distance of one hundred miles from the city. The case did not accordingly exist as one in which the oath of the party himself could be dispensed with, and the libel must be regarded as insufficiently authenticated without it.

It is not necessary that the authority of the attorney in fact to act for the principal should be made to appear when he attests to or files the libel. It is sufficient for him to establish that authority when it is called in question.

The affidavit of the libellant himself is read on this motion for that purpose. It is exceedingly loose and ambiguous on this point, and goes no further than to swear that the proctors were authorized and empowered to take all steps, in his absence, for the collection of the debt, and to assert that the suit is brought for his own benefit and with his consent and approbation.

On a question of rightful authority in the agent, something more than general and loose statements of that kind should be produced to support his acts. If no positive and formal appointment need be shown, at least there should be an ex-

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PLICIT recognition of such agent in the character of an attorney in fact, to uphold his assuming that representation.

Mr. Donohue testifies, in his affidavit, that he verified the libel as agent of the plaintiff, and that he had full power and authority to verify the libel, and was fully authorized to file the same.

It is to be remarked that the libel was filed in the name of Mr. Beebe as proctor, and Mr. Donohue as advocate, and that these gentlemen are connected in business in practice at this bar. All that Mr. Donohue states in his affidavit may be satisfied by the general retaining or authorization of these gentlemen as attorneys to prosecute this demand, without there having been any direct and express appointment of Mr. Donohue as attorney in fact or special agent in the matter. Attorneys in law are agents of the principal, (*Story on Agency*, § 23); but attorneys in fact are so called in contradistinction to attorneys in law, and may include all other agents employed in any business, or authorized to do any act or acts *en pais* for another. *Ib.* § 25.

Judge Story, however, observes, the appellation sometimes designates persons who act under a special agency or a special letter of attorney; so that they are appointed *in factum*; for the deed or act to be done. *Ib.* § 25. This position is supported by reference to Bacon's Abridgment, but Bacon clearly regards it as necessary, in order to constitute an attorney in fact, that his authority should be delegated by deed. 1 *Bac. Abr.* 306, tit. Attorney.

So Comyn distinguishes between attorneys in Court (*Com. Dig.* tit. Attorney, B.) and attorneys for other purposes, (*Ib.* tit. Attorney, C. 1); and lays down the principle that, in the latter case, the appointment must be by deed or letter. *Ib.* 5.

Admitting, however, that a parol appointment is sufficient, it would seem that the nature of the authority delegated, in the fair import of the rule of this Court, would require an express authorization to do the particular act, when done by

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one as agent and not as proctor. One cannot, by virtue of his retainer as attorney in law, assume to act in the cause in the character of attorney in fact. It does not appear, upon the proofs offered in this case, that any other authorization was given by the libellant, than the usual one given to attorneys in Court to prosecute and collect demands. Upon a case standing in that attitude, it is plain that the libellant could not rightfully take an order to hold the defendant to bail.

2. The oath of indebtedness attached to the libel is not sufficiently positive to satisfy the rule on that subject. The evidence of indebtedness must be direct and explicit, and the agent states nothing beyond his information and belief deduced from the examination of documents. *Graham's Pr.*, 1st ed., 130; 1 *Archb. Pr.* 52, 53, 58, 65. The preliminary affidavit being requisite in Admiralty Courts in order to hold to bail, the English rule with regard to the requirements of such affidavit would naturally be adopted as the practice of that Court, especially as it is the guide to the practice of the Circuit Court, and that Court supplies the authority to the District Court in matters of procedure not regulated by specific rules. *Dist. Ct. Rules*, 260. Supplemental affidavits, to make up a case sufficient to justify holding to bail, were not allowed in this State, (*Norton v. Barnum*, 20 *Johns.* 337,) upon the English distinction, that affidavits to cure defects in the original one upon which the defendant was held to bail, were not admissible.

They could not be allowed to retroact so as to authorize continuing the defendant under bail when he had been arrested by means of a defective affidavit.

3. The libellant, in his affidavit, does not deny the allegation of the respondent's deposition that he was part-owner with the libellant in the Roanoke. He asserts that he made the advances claimed in the character of ship's husband, and that the respondent is responsible to him for them. That may be so upon a due adjustment of the legal and equitable rights

of the parties, but this is not a competent tribunal through which to enforce such adjustment. The acknowledged fact that both parties are prosecuting suits against each other in New Jersey, in chancery, upon these claims, indicates plainly enough that the subject-matter is not one of simple indebtedness on the part of the one to the other. A libel cannot be maintained in this Court by one owner against another, to collect a balance to be determined in his favor on the settlement of their joint accounts. The *Fairplay*,¹ (*MSS.*) 1830. The instance side of the Court exercises in such cases no higher or other functions than a court of law, and before either tribunal it would be a bar to such action, to show that it was founded upon a counter and unadjusted responsibility of joint owners, it being insisted upon by each party that his advances to the common concern had been greater than those of his associate.

4. This objection does not apply to the small sum of \$139 accruing from supplies furnished to the schooner *Copper*, and if the arrest of the defendant had been made for that demand alone, it might, perhaps, stand on the footing of an ordinary action by a material-man against the owner of a vessel.

In matters of bail, however, the Court will be governed much by the equitable circumstances of each case. In this instance, the demand is exceedingly stale, and there is no allegation that the respondent could not have been arrested upon it within a reasonable period after the indebtedness had been incurred. Its justness is now denied by the affidavit of the respondent, and it is one of the subjects of litigation between the parties in their chancery suits. Under such circumstances it would not be reasonable or equitable to compel the respondent to give bail to this action in a State foreign

¹ Since reported, 1 *Blatchf. & H.* 133.

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to his domicile, and litigate the matter away from his own residence and that of the libellant, especially when it was already in prosecution between them before a home tribunal. All unwarranted arrests may be vacated, (*Rule 36*,) and the Court may, at its discretion, mitigate or enhance bail according to the rights of parties. *Betts's Pr.* 40. It appears to me that there is no proper ground in this case for the plaintiff to hold the defendant under arrest for a demand disputed by the latter, and which accrued more than ten years since.

5. I am not disposed to lay out of view the fact that the parties have selected a domestic forum for litigating these matters, which are now on investigation before it. Although I do not say that such fact is a legal bar to an action in this Court on the same matters, it ought nevertheless to have a bearing in determining this question upon the equities between the parties. If the respondent has made his motion in due time, he is entitled, upon the principles already indicated, to his discharge, because of the defectiveness or irregularity of the proceeding on his arrest. Should his delay in making the application interfere with such relief as an absolute right, the equitable circumstances may properly be regarded by the Court in determining whether he ought to be longer held in imprisonment in a controversy so circumstanced.

It is supposed by the libellant, that *Rule 25* of the Circuit Court governs the case, and that the respondent is precluded making any application for relief after four days from his arrest. That rule, it must be remarked, does not in terms cover this case. The prohibition is in respect to orders to show cause of action, to mitigate bail, or for a bill of particulars, all of which presuppose regularity in the proceedings, and only provide for relief to the party proceeded against in connection with the continuation of the suit.

This application is founded upon irregularity and defectiveness in the proceedings of the libellant, and the respondent

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may rightfully appeal to the Court for protection against it at any time after it is reasonably presumable he had means of ascertaining such irregularity, and especially when he has done nothing on his part to waive or cure it.

The arrest was made early in August last, and the respondent was confined in close prison thereon about ten days thereafter. No stated term of the Court has been held since the arrest until the present sitting, nor has the Judge been residing in the city so that application could have been made to him personally for relief previous to the term now in session. Although the movement has not been at the very opening of the Court, yet it does not appear that there has been any intentional delay or laches on the part of the respondent, and I am of opinion that he should not lose his claim to relief by the omission to bring forward his motion at the earliest day practicable.

The order will accordingly be, that he be discharged from arrest on his stipulating not to bring an action for false imprisonment against the libellant, or his attorney in fact.

If it was important to the interests of the libellant that his remedy should be sought in an Admiralty Court, he would have had easy access to the one in New Jersey, where both parties reside, and his arrest of the defendant in New York was needless and vexatious.

The defendant is accordingly to be paid his taxed costs on this motion.

Order accordingly.

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Where a cause is referred to experts to ascertain and report upon facts appertaining to their calling or experience, it is the settled rule, both at law and in Admiralty, to adopt the decision of the referees, unless there is a manifest preponderance of testimony against it:

Where, by the terms of a contract for work and materials, a part of the contract price is to be paid in instalments as the work advances, the employer is not entitled, on the adjustment of a decree for a balance remaining due on the work, to be credited with interest on the payments made by him while it was advancing.

Where a party contracting to furnish labor and materials has completely fulfilled the contract on his part in due time, he is entitled to recover in a suit for the compensation stipulated by the contract, interest on the amount due him, at least, from the commencement of the suit.

But where, in such case, the right of the party to recover his compensation under the contract is doubtful and contested on reasonable grounds, and the amount due him requires to be adjusted by the proceedings in the suit, interest is only recoverable after the right of the party to recover, and the amount of his recovery have been determined.

If in such case the report of referees fixing the amount due to libellant is ultimately confirmed, he will be entitled to interest from the filing the report, although both parties have excepted to the report, and prosecuted their exceptions to a hearing with a view to have it set aside.

THIS was a libel *in rem* by "The Allaire Works," a corporation created under the laws of the State of New York against the steamboat Isaac Newton, to recover for an engine, &c., supplied to that boat.

The cause was before the Court in July, 1847, when a decree was rendered affirming the right of libellants to recover upon their demand, subject to certain deductions to be made in favor of the claimants. The proceedings had at that time are reported, *ante*, 11.

By the decree then rendered, a special reference was directed to commissioners, to be selected by the parties and approved by the Court, of several particulars embraced in the action. The commissioners were directed to ascertain what extra

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work was done by the libellants beyond that embraced by the contract, and what was the value thereof; what would be the cost of altering and improving the boilers so as to conform them to certain specifications prescribed in the contract; and also what payments were made by the claimants for wharfage, insurance, &c., on the boat, from May 15th to October 8, 1846.

On February 20, 1849, by consent of parties, Hon. R. Hyde Walworth, William Kemble, and S. Bartlett Stone, were designated as such commissioners.

The commissioners made up and signed their report May 11, 1849; and on July 3d, thereafter, it was filed in Court. The findings of the commissioners were as follows:—

That the labor and materials charged by the libellants as extra, beyond the contract in the account attached to their libel, for gallows frames and suspension frames, for additional boiler bearers, iron pans for holding cement, lengthening bolts for king posts, braces, whitewashing, covering shafts, oil cups, passenger bell and fixtures, bands for casing of cylinder, mahogany for box, fixing chandelier, pawl-wrench and drills, and mercury, were not properly and fairly for appurtenances to the engine or boilers as modern improvements to approved boilers and engines known and used on the Hudson River in the year 1845, but were extra work.

That the charges for tools, bells and fixtures, above mentioned, do not embrace any which were necessary tools, fixtures and bells for the said engine. That the fair and reasonable value and worth of the labor and materials so charged for, on October 8, 1846, was the sum of one thousand eight hundred and one dollars and sixty-eight cents. That no other of the charges for extra work were for work that was extra.

That the reasonable cost and expense on October 8, 1846, of so altering and improving the said boilers, according to the said decree, as that they should supply the said engine at least forty pounds of pressure of steam to the square inch of the

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piston of said engine, with the throttle wide open, and also so as to reduce the consumption of fuel proportioned to that consumed by boilers of approved construction with the modern improvements employed on the Hudson River anterior to November 1, 1845, is the sum of five thousand dollars.

That the expense or value of braces or rims to the water-wheels sufficient to render the same secure when the said engine is worked with the power referred to in said decree, is the sum of seven hundred dollars; estimated at the value on October 8, 1846.

And that the payments and disbursements actually and necessarily made or incurred by the claimants between the 15th day of May and the 18th day of October, 1846, for wharfage for said steamboat, for insurance on her, and for keeper's wages on board her, amount to the sum of seven hundred and fifty-four dollars and twenty-eight cents.

Both libellants and claimants filed exceptions to the report; and the cause now came before the Court upon these exceptions.

Mr. Moore, for the libellants.

H. S. Dodge, for the claimants.

BETTS, J. The exceptions taken by both parties relate substantially to the allowance of \$5,000 made by the commissioners to the claimants, because of the insufficient or defective construction of the boilers by the libellants; the one party contending it is too high, and the other that it is insufficient and short of the injury proved. To this point, it appears, the main attention of the commissioners was directed in taking proofs, and on the argument before them.

The testimony taken in Court on the hearing was laid before them, some of the same witnesses were reëxamined by them, and additional ones were produced, to the end that this branch of the case might receive the most searching and detailed consideration.

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Much of the evidence upon this point was necessarily hypothetical, and, as might be expected, widely variant in its suggestions and inferences. This difficulty was perceived and felt by the Court on the hearing, and the reference in the case was directed chiefly in order to have facts of this character presented to men of practical experience, who could better appreciate the application and effect of the testimony than the Court could hope to do, and whose judgment would be framed with higher advantages for accuracy than the Court could expect to command on a hearing in its presence. The commissioners were selected with a view to their qualifications in respect to all matters which were to be brought before them. They have given, it seems, a full and patient hearing to the parties, and the result of their examination of the subjects is expressed in the report signed by them and on file. I do not feel that the argument on the exceptions has brought to my mind any well-grounded cause for disapproving that result.

The commissioners have not particularized the defects they discovered in the construction of the boilers, nor pointed out what changes they regarded as important to be made, nor designated the manner in which the sum of \$5,000, allowed by them on account of the deficiency of the boilers, could be applied to their improvement or alteration so as to produce the amount of steam required by the contract. The order of reference did not enjoin upon them the duty of so doing.

Their attention was most carefully called to the point, on the part of the libellants, that the head of steam demanded, according to the decree, could be readily and certainly secured without any alteration of the boilers, and the witnesses gave in full their theories upon that hypothesis. Their estimates brought the expenses, for any useful changes which could be proposed, down as low as three or four hundred dollars for each boiler.

These theories and estimates were combated by testimony

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on the part of the claimants, who considered it must cost six or seven thousand dollars for each boiler, to place them in a condition to supply the steam demanded by this engine.

The exposition of the reasons upon which the decree was founded, shows that it was not contemplated by the Court to adjudicate the point, that an alteration in the shape or size of the boilers must necessarily be made. The decree indicated distinctly the object to be attained, and which this engine and apparatus (including the boilers) have failed to accomplish, and the advice of competent officers or commissioners was invoked to determine what expense would be necessary to effect that object. Two of them are men of extensive experience in these matters, and their opinions, after hearing all the proofs, both as to the necessity of changes in the construction of the boilers, and the cost involved in such changes, must necessarily have great weight in determining the judgment of the Court on the subject. The inquiry related solely to matters of fact and mechanical expedencies, and I should distrust any conclusions of my own at variance with the judgment of the commissioners on such particulars.

Had these gentlemen sat with the Court in the capacity of auditors, on the hearing, I should have deferred to their judgment on facts of a professional character, as justly entitled to control my own when not palpably in conflict with the testimony. And although in reperusing the proofs taken at the hearing, and reading over carefully that given before the commissioners, I might regard it as tending to prove that a much greater outlay would be required to place this engine in the condition stipulated for in the agreement, yet if I had possessed the advantage of a personal conference with them, their explanations of matters merely mechanical, might well have convinced me that my impression was erroneous, and that their opinion was most to be relied upon.

In cases of reference, out of Court, to experts to ascertain and report upon facts appertaining to their calling or experi-

ence, it appears to be the settled rule of law to adopt their decision, unless there is a manifest preponderance of testimony against it. *Doyle's Adm'rs v. St. James's Church*, 7 *Wend.* 178. Such is also the established usage with maritime courts in reviewing the decisions of inferior tribunals upon matters of fact.

There are various ways, in consonance with the evidence, in which material alterations may be made in the apparatus for generating steam, without an expense exceeding \$5,000, and the judgment of the commissioners, whether these methods would be efficacious and sufficient, is more satisfactory to the Court than its own opinion would be, not so aided, upon subjects so purely mechanical and professional.

The minor exceptions were not pressed on the argument, and I discover no cause for departing from the conclusions adopted by the commissioners in the allowances made by them to the parties respectively in these particulars.

The report is accordingly confirmed in all its parts.

The libellants insist they are entitled to interest upon the balance which the Court may decree them, from the delivery of the vessel and engine to the claimants. The question of costs is also involved in the decree to be finally rendered.

On the 8th of October, at which time the libellants claim their contract was fully performed, they had been paid from time to time, as the work progressed, according to the provisions of the agreement, the sum of \$35,000. The claimants contended, that if an interest account is raised, they are entitled to receive it on these advances.

This claim manifestly cannot be supported. The advances were to be made before the claimants could have any possession or use of the work, and accordingly interest on those advances, or their present value in relation to the time of the completion of the contract, must have entered into the contemplation of the parties, and be deemed adequately provided for in the terms or consideration upon which the work was to

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be done. In effect, the interest on these payments as respectively advanced, in addition to the price named, \$46,000, would be the stipulated or contract price for the work and materials.

Had the claimants accepted the work on the 8th of October as a performance of the contract, there could be no question of the legal and equitable rights of the parties in respect to interest. It would become, from such delivery, a portion of the unpaid debt due the libellants, continuing to run with the debt until that was satisfied by the claimants. At least, interest would have run from the time the suit was commenced, which was only two days after, notwithstanding the contract was special. *Foster v. Heath*, 11 *Wend.* 478.

This is on the idea that the agreement is entirely fulfilled on the part of the libellants, and that they are justly entitled to the compensation stipulated; for, as a general rule, interest cannot be enforced on uncertain demands, or unliquidated damages, nor on damages demanded for non-performance of a contract. *Hittings v. Consequa*, *Pet. C. C. R.* 172; *Buckmaster v. Grundy*, 3 *Gilm. (Ill.)* 626; *Speer v. Van Orden*, 2 *Penn. R.* 652. Nor is interest allowed when more is demanded than is due, or upon uncertain demands which are to be settled by process of law. *Doyle's Adm'rs v. St. James's Church*, 7 *Wend.* 178; *Hill v. Hall*, 20 *Id.* 51.

In this case, not only was the balance rightfully belonging to the libellants to be settled by process of law, but also a question vital to the right of recovery at all, was in contestation in the suit, with at least reasonable color of grounds of defence on the part of the claimants. They could not, accordingly, be justly required to recognize the demand or make any tender for its satisfaction until after the decree of the Court had fixed the right of recovery, and the report of the commissioners had liquidated the amount.

It is true both parties dissent from the report, and by their exceptions appeal to the Court to set it aside;—the libellants,

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because it awards them greatly less than their just dues, and the claimants, because it undervalues the damages they have sustained, and which were to be deducted from the contract indebtedment. Still, according to the ordinary usage of Courts, the report of referees must be regarded as liquidating the uncertain damages so far as to afford *prima facie* evidence that the libellants were entitled to that amount, and to put the claimants to the election of tendering its discharge, or afterwards litigating its recovery at the hazard of interest thereon.

I shall, therefore, allow interest on the balance of \$6,347.40 so reported by the commissioners, at the rate of six per cent. per annum, from July 3, 1849, the day the report was filed in Court, and thus became legal notice to the claimants. It is not made to appear upon any evidence before the Court, that the very unusual delay in closing this case, which has intervened, since the decision upon the merits, is ascribable to any fault of the claimants, and accordingly interest will not be carried back further than the term the report was brought into Court.

The libellants, as actors, had the efficient control of the cause, and might have speeded its decision at their option. Had their efforts to do so been thwarted by acts of the claimants, an equity might then have arisen to interest on the balance ultimately adjusted, during the period of such interception or procrastination of their suit. Here the delay was either their own or was acquiesced in by them; and affords no equitable ground for the allowance of interest during its continuance.

I discern in this case no principle distinguishing it from those to which the ordinary rule in respect to costs, applies; which is, that the successful party recovers with the amount in his favor, the costs which have accrued in prosecuting his right.

The case has been litigated in good faith, no doubt, on both sides. Had the demand been defeated *in toto*, full costs would have been awarded in favor of the claimants, and the converse

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of the principle is properly applied to them when their adversaries are the successful party.

The defence put in issue the right of the libellants to any compensation, or to maintain a suit upon the contract. They may be fairly held to take the advantages of a defence so comprehensive and entire, together with its hazards. If it succeeds, they stand discharged of the suit with their costs; and if it fails, the balance justly reclaimable from them should be paid with the taxable costs created in enforcing its collection.

Decree accordingly.

Two cases only, it will be observed, are reported for the whole of the year 1850. During that year, Judge Betts was much interrupted in holding the District Court, in part by a long-continued illness, and afterwards by an unusual pressure of engagements in the Circuit Court. Not many decisions rendered during that year by him in the District Court are to be found on file. The few which have come to the hand of the reporters have been carefully examined, but the two given above are the only ones they have thought best to report.

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ACCOUNT.

1. A Court of Admiralty in this country may entertain a suit *in personam* for a balance claimed by a seaman to be due to him on an account of the profits of a voyage, as his share thereof, where the libel avers that a specific sum came to the hands of respondent as the proceeds of the voyage, and that libellant is entitled to a specific share of such sum. *Duryee v. Elkins*, 523.
2. On such a libel, the Court may inquire into the validity of any charges in account made by the respondent against the libellant, and relied upon as reducing or satisfying his share. *Ib.*
3. A Court of Admiralty cannot entertain a libel *in personam* which seeks to bring respondent to a general accounting for the proceeds of the voyage, and to compel an adjustment of the proportion in which libellant is entitled to share in them. *Ib.*
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ACTION.

Where a contract between the owners of a steamboat and other parties for the erection of a steam-engine in the boat, provided that the builders should test and prove the work, when completed, in a certain way; and before they had so tested and proved it, the owners of the boat took possession of her, and commenced running her, and the builders thereupon com-

menced an action without ever having applied the stipulated tests :—*Held*, that the action was not prematurely brought; as the owners, by taking possession of the boat as their own, must be regarded as having admitted their liability to pay whatever was justly due for the work actually performed. *The Isaac Newton*, 11.

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1. By the general law maritime, the vessel is bound to the shipper for the performance of a contract of affreightment made with the master, whether by charter-party, by bill of lading, or by parol. *The Flash*, 67.
2. The master of a New York vessel contracted, at the port of New York, to transport a cargo across the East River to Brooklyn,—a voyage less than a mile in length, but across tide waters. He took a part of the cargo on board, but afterwards refused to take on the residue, or to deliver that already laden.

Held, that an action *in rem* would lie both for the refusal to receive on board and the refusal to deliver; notwithstanding that the contract was made in the home port, and for a voyage of so local a character, and notwithstanding that only a portion of the goods were received on board. *Ib.*

3. The master of a vessel having contracted for the transportation of a cargo, the performance of the contract was interrupted while the lading of the cargo on board was going on, by the death of the master, and by the freezing up of the vessel. The owner repudiated the contract, and refused either to take on board the residue of the cargo or to deliver up that already laden.

Held, 1. That the contract was binding upon the vessel and owner.

2. That the owner was, under the circumstances, entitled to indulgence for a reasonable time, both to procure a new master and to await the relief of his vessel.

3. That upon the owner's refusal to be bound by the contract, the libellant was entitled to proceed against the vessel for his damages.

4. That the libellant could recover damages for the value of the brick

laden on board and withheld;—for the cost of transporting the residue from his store-house to the dock;—for any injuries received by them while they lay there awaiting the owner's acceptance;—and for the difference in his disfavor, if any, between the contract price of transportation and his actual expenses incurred in obtaining another mode of conveyance.

5. That the libellant could not recover against the vessel for injuries received by the property after notice of the owner's refusal to complete the contract, but that the vessel was chargeable with the costs of transporting the portion of cargo left behind, to its place of destination. *The Flash*, 119.

4. A variance between the amount of a cargo of grain as stated in the measurer's bill in lading it on board, and the amount of such cargo as ascertained on delivery at the port of consignment, may be explained by showing that the mode of ascertaining the quantity is such that similar variations are necessarily of frequent occurrence. *Manning v. Hoover*, 188.
5. Consignees are entitled to a reasonable opportunity to ascertain whether goods delivered to them correspond in quantity and condition with the description given in the shipping documents, and the liability of the master and owner remains undischarged during such period. *Bradstreet v. Heron*, 209.
6. A charter-party, sounding wholly in covenant, contained agreements on the part of the owner that the vessel was fit for the voyage,—that she should take in a cargo to be furnished by the charterer, reserving her cabin and room for her crew, water, provisions, &c.,—that the privilege of putting on board steerage passengers should belong solely to the charterer, and that if the ship should be unable to carry cargo and passengers to the stipulated amount, there should be a reduction of freight. On the part of the charterer, it was agreed that he should furnish the cargo—should pay a stipulated freight and demurrage in case of delay in loading, &c.

Held, that this charter-party, construed under the presumption of law against a change of ownership, and in the light of the acts of the parties under it, was but an affreightment for the voyage, and not a letting of the entire ship, so as to constitute the charterer owner for the voyage. *The Aberfoyle*, 242.

7. As between the original parties to a shipment, it is competent for them to show the actual condition of the goods at the time of the shipment. *Baxter v. Leland*, 348.
8. As between the owner of the cargo and the ship-owner, the delivery of the cargo at the port of destination is a condition precedent to the right to freight; and without such delivery the acceptance of the cargo at an intermediate place by the owner of the cargo, is necessary to enable the ship-owner to recover either full or *pro ratâ* freight. *The Ann D. Richardson*, 499.

9. The laying claim to the proceeds of a sale of a cargo made by the master at an intermediate port, or the bringing suit for such proceeds, does not amount, in law, to a voluntary acceptance of the cargo, or to a ratification of the act of the master in breaking up the voyage. *Ib.*
 10. The owner of the vessel takes the risk of working weather during the time required for the unlading of the cargo. *Sprague v. West*, 548.
 11. The consignee takes the risk of roads and means of transportation from the dock ; and is bound to take the cargo as delivered to him at the vessel's side, and to remove it as fast as the vessel can be reasonably discharged. *Ib.*
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1. The non-imprisonment act of the State of New York (1 *Rev. Stats.* 807, § 1,) is made to be within this State the law of the United States also, by force of the acts of Congress of 1839 and 1841 ; (5 *U. S. Stats.* 321, 410 ;) but it does not embrace arrests upon process issuing out of a maritime court. It is limited to civil process issuing out of *courts of law*, and executions issuing out of *courts of equity*. *Gardner v. Isaacson*, 141.
2. The standing Rules of the District Court relating to bail stipulations to be given on the execution of a warrant *in personam*, and to the method of enforcing them, are superseded by the Supreme Court Rules of 1845, upon the same subject ; and stipulations must now be exacted conformably to the Supreme Court Rules. *Ib.*

3. A respondent, arrested in an Admiralty suit, is not entitled, upon the return day of the warrant, to be discharged from arrest, on giving a stipulation for *costs*, pursuant to the Rule of the District Court, but he must remain in custody until he gives bond or stipulation to satisfy the *decree* made against him. *Ib.*
4. The Act of Congress of August 23, 1842, (4 *U. S. Stats.* 518, § 6,) conferring upon the Supreme Court power to regulate the practice of the Circuit and District Courts, taken in connection with the rules promulgated by the Supreme Court under that act, in 1845, operates as a suspension of the acts of Congress of 1839 and 1841, abolishing imprisonment for debt on process issuing out of the United States Courts in all cases where, by the local law, it would be abolished. *Gaines v. Travis*, 422.
5. Since the adoption of the Rules of 1845, parties are liable to arrest and imprisonment on process issuing out of the United States Courts, irrespective of subsequent legislation in the several States abolishing imprisonment on like process. *Ib.*
6. The general course of Admiralty procedure in this country requires a *sworn* libel as the foundation of any process of arrest of person or property. *Martin v. Walker*, 579.
7. In holding a respondent to bail, a Court of Admiralty will be governed much by the equitable considerations of the case. *Ib.*
8. Accordingly, where a libellant procured the arrest of respondent in a suit brought in a district different from that in which they both resided, upon a stale demand, of small amount, and which was already in litigation between the parties in the courts of the State in which they dwelt,—*Held*, that the respondent ought to be discharged from the arrest. *Ib.*

MOTION, 1, 3. PRACTICE, 9.

AUCTION.

DAMAGES, 1, 2, 4.

AVERAGE.

FREIGHT, 2.

BAIL.

1. The practice of Courts of Admiralty does not admit of a surrender of the principal in exoneration of bail. *Cure v. Bullus*, 555.
2. In order to be discharged from a bail bond or stipulation given in Admiralty, the party must establish fraud, deceit, duress, illegality of considera-

tion, or other matter such as at law or in equity would avoid a common money bond, or would entitle a party to be relieved from it. *Ib.*

ARREST.

BILL OF LADING.

1. A variance between the amount of a cargo of coal as stated in the bill of lading, and the amount of such cargo as ascertained on delivery at the port of consignment, may be explained by showing that the mode of ascertaining the quantity is such that similar variations are necessarily of frequent occurrence. *Manchester v. Milne*, 115.
2. As between the original parties to the bill of lading, its statements respecting the *condition of the goods* at the time they are laden on board, may be explained or rectified by parol proof. *Bradstreet v. Heron*, 209.
3. But as against assignees of the cargo upon a valuable consideration, the rule is clear that the master and owner are concluded by the representations of the bill of lading. *Ib.*
4. The owners of a vessel are excused from fulfilling the engagement of a bill of lading to deliver the cargo at a specified port, by the interposition of sanitary or prohibitory laws controlling them in that respect; for the contract to deliver will be construed as subject to all restraints of government. *Ib.*
5. A usage of consignees at a particular port to receive shipments during the quarantine season, at the quarantine grounds, as being a compliance with the engagement of the bill of lading to deliver at such port, is valid; and the bill of lading should be construed with reference to it. *Ib.*
6. Under a bill of lading which acknowledges the receipt of goods for transportation in good order, the carrier may, notwithstanding, show, in case of injury to the goods, and as against the owner of them, that it was occasioned by insufficiency in the cask, case, &c., in which they were packed, and not by any negligence or misfeasance upon his part. *Zerega v. Poppe*, 397.
7. But the law presumes that the goods were delivered to the carrier in the condition specified in the bill of lading; and the burden of proof lies upon the carrier to rebut this presumption. *Ib.*
8. It is not sufficient, in case of damage to goods received under such a bill, for the carrier to show that the goods were delivered to him in sufficient packages, and that the defect was not discoverable by him. He must also show that the loss actually resulted from such insufficiency, and from no fault of his. *Ib.*

AFFREIGHTMENT, 7. PERIL OF THE SEAS, 1.

BURDEN OF PROOF.

1. Where the respondent, in an action for a seaman's wages, relies upon a payment made in advance to the shipping agent by whom the libellant was shipped, the burden of proof is upon the respondent to show affirmatively, not only that the payment was made, but also that the shipping agent was authorized by the libellant to receive it. *Holmes v. Dodge*, 60.
2. A shipper of a cargo of grain who takes no bill of lading from the carrier, is bound, in an action brought to recover for short delivery, to prove the amount delivered by him to the carrier to be transported. *Manning v. Hoover*, 188.
3. In order to prevail in an action for damages occasioned by a collision, more must be done by the libellant than to show his vessel clear of blame; he must make it manifest that the loss was occasioned by the fault of those in charge of the colliding vessel. *The Columbus*, 385.
4. In an action brought against a master by a seaman found secreted on board and ordered to do duty and punished for refusal, to recover damages for the punishment inflicted, it is imperatively incumbent on the master to prove, in order to justify the punishment, that before giving the order he informed himself as to the seaman's experience and capacity, and ascertained that he was able to perform the work required of him. *Allen v. Hallet*, 573.

BILL OF LADING, 7, 8.

CARGO.

AFFREIGHTMENT, 2, 3, 4, 5, 7, 8, 9, 10, 11. COMMON CARRIER, 1, 2, 3.
FREIGHT, 1, 2. MASTER, 6. MONEY IN COURT, 1. PERILS OF THE SEAS, 2.

CHARTER PARTY.

AFFREIGHTMENT, 6.

COLLISION.

1. An injury received by a vessel at her moorings, in consequence of being violently rubbed or pressed against by a second vessel lying alongside of her, in consequence of a collision against such second vessel by a third one under way, may be compensated for under the general head of collision, as well as an injury which is the direct result of a blow properly so called. *The Moxey*, 73.
2. But to entitle the injured vessel to recover against her stationary neigh-

bor, under such circumstances, instead of against her who was the original cause of the accident, such stationary vessel must be proved to have been in fault. *Ib.*

3. Where two vessels are running in the same direction, the one astern of the other, there rests upon the rear vessel an obligation to exercise precaution against collision, which is not chargeable to the same extent upon the other. *The Governor*, 108.
4. A vessel in advance is not bound to give way, or to give facilities to enable a vessel in her rear to pass her, though she is bound to refrain from any manœuvres calculated to embarrass the latter in an attempt to pass. *Ib.*
5. A vessel of superior speed, running in the same direction with a slower one, has a right to pass her if she can do so with safety to both; but the burden of proof is upon her, in case of collision, to show the prudence of her own conduct, and also to prove negligence or misconduct on the part of her rival. *Ib.*
6. A sailing vessel is bound, when navigating in proximity to a steamboat, to take all reasonable precautions to protect herself, and to avoid injury to the steamboat, and she is not entitled to impose upon the steamer the duty to guarantee her against a collision. *The New Champion*, 202.
7. If injured by collision with a steamboat, the sailing vessel must discharge herself from fault, and show the adverse vessel guilty of culpable neglect, or want of due equipment or skill, which led to the collision. *Ib.*
8. A steam vessel running into harbor, or through the common thoroughfare of other vessels, is bound to take extra precaution against collision with sailing vessels; and in the night, or in case of a fog, must move with great circumspection, or even lay-to or anchor, according to the danger of encountering other vessels. *The Bay State*, 235.
9. A sailing vessel at anchor or lying-to in a dark night or in a dense fog, is also bound to take such precautions as may be in her power, to give warning of her position to other vessels, whether steamers or vessels under canvas, which may be nearing her. *Ib.*
10. Under the usages of navigation upon Long Island Sound, the blowing a horn, the ringing a bell, or the beating upon an empty barrel or upon an anchor, is a reasonable precaution which a sailing vessel lying-to in a fog is bound, as towards a steamer which may come in collision with her, to take, in warning off such steamer. (Since reversed.) *Ib.*
11. Where a collision occurred at night between a steamboat under way and a schooner at anchor in the middle of the Hudson River, opposite Fort Lee,—*Held*, that the taking up an anchorage in the middle of the river was not an act of culpable conduct on the part of the schooner. *The Indiana*, 330.
12. When a steamer and sailing vessel, proceeding in opposite directions, are approaching each other on courses which may lead to a collision, the steamer cannot be excused for holding her way, upon the hypothesis and

belief that the sailing vessel cannot with safety to herself keep her tack, but must go about or come into the wind before they meet. *The Washington Irving*, 336.

13. The law casts upon the steamer the obligation of using effectively and promptly the extraordinary means she possesses to prevent a collision. *Ib.*
14. A collision occurred in the day time, between a sailing vessel sailing on her starboard tack, on a flood tide, and a steamboat; for which a libel was filed on the part of the vessel.

Held, 1. That it was incumbent on the steamboat to show some improper act or omission on the part of the sailing vessel, causing the collision, or it would be presumed that the steamboat neglected to use those precautions to avoid collision which the law required her to exercise.

2. That in order to protect the steamboat, such excuse must be set forth clearly in the answer of the claimants, and must be proved as laid. *Ib.*

15. Where a steamer and sailing vessel are approaching each other in dangerous proximity, it is not, in ordinary circumstances, the duty of the sailing vessel to give way to the steamer; but it is her right and her duty to maintain her course. *The Cornelius C. Vanderbilt*, 361.
16. But if there are special circumstances from which it clearly appears that the sailing vessel can prevent a collision otherwise inevitable, by a departure from her course, she is bound to make it. *Ib.*
17. A sailing vessel on the wind, meeting or converging toward a common point with a steamer, has no right to persist in her course in such a manner as to make a collision probable, or so as to drive the steamboat into danger or exposure in order to avoid her, particularly after being hailed to change her course. *Ib.*
18. This principle is especially applicable to sailing vessels and steamers meeting in the harbor of New York. *Ib.*
19. A ferry-boat plying across a navigable river is bound to remain in her slip, notwithstanding her appointed time of departure has arrived, if any vessel is seen or is in a position to be seen from on board her, with which she will be in danger of coming in collision if she goes out. *The Columbus*, 385.
20. But she is not compelled to lie waiting the expected arrival of another vessel. *Ib.*
21. Where a vessel comes suddenly and without warning into imminent peril of a collision,—*e. g.* where two vessels approaching are concealed from each other by intermediate objects until they are close upon each other,—the necessary uncertainty and confusion created by the surprise is to be taken into account in determining whether the management of the respective vessels is proper or blameworthy. *Ib.*

DAMAGES, 3, 5, 6, 7, 8. NEGLIGENCE. USAGE. WITNESS, 1.

COMMON CARRIER.

1. Where there is no provision in the contract of affreightment varying the liability of the common carrier, he can only relieve himself from liability for injury to goods intrusted to him, by proving that it was the result of some natural and inevitable necessity superior to all human agency or control, or of a force exerted by a public enemy. *The Zenobia*, 80.
2. A vessel having on board a cargo of flour for transportation, capsized at her wharf before sailing, and the cargo was much damaged. The carriers might easily have communicated with the owners of the cargo, and sought instructions as to the disposal of it; but they neglected to do so, and sold the cargo upon their own authority, at auction; after which the vessel sailed, and in due time arrived at the port of delivery.

Held, 1. That the sale of the flour, under these circumstances, was an unlawful conversion by the carrier.

2. That the owners of the cargo were entitled to recover the value of the cargo at the port of delivery, deducting freight and charges, and adding interest on the balance.

3. That the value of the cargo should be computed by the market price at the port of delivery, at the time of the arrival of the vessel, it appearing that except for the accident, the cargo would at that time, in the ordinary course of things, have been delivered; with a privilege, however, to the owner to claim the amount realized upon the sale of the goods at auction. *The Joshua Barker*, 215.

3. Where there is a notorious custom in a particular branch of commerce, of stowing goods of a particular description on board ship in a certain way, shippers, who consider such mode of stowage hazardous, must notify carriers of their wish to have a different one adopted, or they will not be entitled to charge the latter with injuries received in consequence of its adoption. *Baxter v. Leland*, 348.
4. The propriety of the common-law rule respecting the liability of common carriers considered. *Ib.*

AFFREIGHTMENT. BILL OF LADING. PERILS OF THE SEAS.

CONSIGNOR AND CONSIGNEE.

AFFREIGHTMENT, 5, 11. DAMAGES, 4. DEMURRAGE, 1.

CONSULAR DISCHARGE.

1. The certificate of a consul of the United States in a foreign port, (under

- the Act of July, 1840,) that the discharge of a seaman was granted upon the seaman's consent, is conclusive upon that fact, unless it is shown that the conduct of the consul was corrupt or fraudulent. *Lamb v. Briard*, 367.
2. The discharge of a seaman in a foreign port (under the Acts of February 28, 1803, and July 20, 1840,) can be ordered by the consul, only upon the consent of the *seaman*, given, or proved before him. *The Atlantic*, 451.
 3. The party relying upon such discharge in defence to an action for subsequent wages, must show the fact that such consent was given. *Ib.*
 4. Where a master procures a seaman to be discharged by a United States consul in a foreign port, if any deceit or collusion has been practised by the master in obtaining the discharge, he can claim no benefit or immunity under it. *Tingle v. Tucker*, 519.
 5. When there is no evidence of improper conduct on the part of the master in obtaining a seaman's discharge by a consul, and it appears that the consul has proceeded fairly, and on clear *primâ facie* proofs has ordered the seaman to be discharged for criminal conduct, such discharge itself is a bar to any continuing claim for wages which might be enforced if the seaman's connection with the vessel still subsisted. *Ib.*
 6. The propriety of the consul's interference is to be determined upon the facts before him, and not by the case which may be afterwards shown upon a trial. *Ib.*
 7. Where a United States consul in a foreign port discharges a seaman without payment of three months' wages, (under 5 *U. S. Stats.* 395, § 1,) the discharge will not avail the owner as a defence to a suit for the two months' wages, which by the provisions of the act accrue to the seaman, unless the consul makes an official entry of his act both upon the list of the crew and upon the shipping articles. *Miner v. Harbeck*, 546.
 8. These entries must be made by the consul personally. *Ib.*

CONTRACT.

1. The libellants, manufacturers of steam-engines, had contracted with the claimants to build for a boat owned by the latter, a steam-engine, with the main cylinder eighty inches diameter of bore, and twelve feet stroke of piston, of the best materials and workmanship, and of sufficient and suitable size and strength in all its parts, and to include all modern improvements; the boilers to be of the best Pennsylvania wrought iron, and of the most approved construction for generating steam with economy of fuel, and of size to supply the cylinder with steam at as many pounds pressure to the square inch on the piston, when working with the throttle wide open,

as are used by the fastest steamboats on the Hudson River when going at their greatest speed.

Held, upon this agreement and upon the evidence in the cause, that the intention of the parties was that the boilers should be so constructed as to furnish the engine with at least forty pounds pressure of steam to the square inch on the piston (or boiler) when working with the throttle valve wide open, using such length of cut-off to the piston as was customary with the class of boats referred to. *The Isaac Newton*, 11.

2. Where, by the terms of a contract for the construction of a steam-engine, in a boat owned by the employing party, the consideration-money was to be paid by instalments as the work advanced, so that a large portion of it would be payable before the time for the full performance of the contract:

Held, that the perfect fulfilment of the agreement by the party employed was not a condition precedent to the obligation of it upon the employer; nor could the latter take possession again of the boat without compensating the former for the benefit actually received, although the work was not done in entire conformity with the specifications. *Ib.*

3. Where a writing, although embodying an agreement, is manifestly incomplete, and not intended by the parties to exhibit the whole agreement, but only to define some of its terms, the writing is conclusive as far as it goes; but such parts of the actual contract as are not embraced within its scope, may be established by parol evidence. *The Alida*, 173.

4. The owner of a steamboat, and a corporation engaged in the business of supplying coal to steamboats, had for some months been accustomed to deal with each other for the supply of coal required by the boat; the requisite supply for her wants upon each trip being furnished her on each arrival. Under these circumstances the owner executed a written memorandum, acknowledging that he had purchased 1500 tons of coal at a specified price per ton; which was, however, silent as to time and mode of delivery and payment.

Held, 1. That the previous course of dealing between the parties might be shown to establish their intention in regard to these points.

2. That upon this evidence the contract must be construed as intending a delivery of the coal from time to time as it might be ordered to meet the wants of the boat, and as creating an obligation to pay for each parcel of coal as delivered. *Ib.*

AFFREIGHTMENT. BILL OF LADING. INTEREST. LIEN, 1, 2, 3, 7, 8. PASSENGER, 1. PILOTAGE, 1, 2. PRESUMPTION, 1. SALVAGE, 2. SHIPPING ARTICLES.

COOK.

SEAMEN, 10.

COSTS.

1. As a general rule, a reference to a commissioner, in a suit for wages, is a regular and necessary step on the part of the libellant, incidental to the prosecution of the action, and cannot be the subject of an independent charge in a bill of costs. *Holmes v. Dodge*, 60.
2. Where, however, the reference is solely for the benefit of the respondent, the Court will modify the order of reference so as to require the extra costs incurred to be defrayed by him. *Ib.*
3. Such modification must be asked for on obtaining the order of reference. *Ib.*
4. It is inequitable for a seaman, knowing that the papers are ready for the immediate commencement of a suit by his shipmates for the recovery of wages earned on the same voyage,—or by a bottomry holder, who sues also for a portion of the wages of the voyage, previously paid by him,—to endeavor to supplant such action, by urging out in his individual name, process in advance of it, so as to subject the ship or her proceeds to needless expenses. *The Cabot*, 150.
5. Costs will not be allowed the seaman in such case, nor to others who unite in the proceeding instead of joining in the prior suit in progress. *Ib.*
6. Costs are not taxable for the preparation of written arguments, except upon a stipulation in writing to that effect. *Manchester v. Milne*, 158.
7. In what cases costs may be taxed upon motions to enlarge time to answer, upon motions for final decree, motions for costs, for a reference, &c. *Ib.*
8. In what cases costs may be taxed for motions to postpone the hearing of a cause called in its order on the calendar. *Ib.*
9. Where a libel demanded the recovery of \$6.75, wages due to each of two libellants, and \$75 to each for salvage services, and the claim for wages was allowed, but that for salvage service was disallowed, and the decree was generally for the wages due, “with costs,”—*Held*, that plenary costs were taxable in favor of libellants. *The Remnants of the Caithneshire*, 163.
10. The discretionary power of the Court over the award of costs cannot be exercised on an appeal from taxation, especially after the expiration of the term in which the decree is rendered. *Ib.*
11. Costs of a suit for seaman’s wages imposed on libellants, where the crew had taken possession of the vessel while on her voyage and brought her home, under reasonable grounds of suspicion that she was to be engaged in the slave-trade. *The Mary Ann*, 207.
12. Of the allowance of costs upon exceptions to a commissioner’s report made in the alternative. *The Joshua Barker*, 215.
13. A mere attempt to negotiate a compromise of a claim at an amount speci-

fied, unaccompanied with a tender or direct offer to pay such amount, does not operate as an equitable bar to costs. *The H. B. Foster*, 222.

14. It is the course of Admiralty Courts not to impose costs upon seamen when they establish probable cause for instituting suits for redress. *Howland v. Conway*, 281.
15. Three causes, brought on the same facts, by different libellants, being at issue, it was stipulated that two should abide the decision of the third. Before the third was brought to hearing, the libellant died; and his administratrix continued the cause. A decree was rendered in favor of the claimants; but *without costs*, for the reason that the action was prosecuted by an administratrix.

Held, that in the other causes, the claimants were entitled to decrees dismissing the libels, *with costs*. *The Buffalo*, 483.

16. A libel was filed by each of two members of a ship's crew to recover damages for breach of a shipping contract; and subsequently eleven other libels were sworn to by eleven other members of the crew, upon the same state of facts and upon the same cause of action. Before answer was filed to either of these libels, and before the eleven libels were filed, a stipulation was entered into that the thirteen causes should be consolidated. An answer, presenting two issues, was then put in, and the cause having been brought on for hearing, the libellants prevailed upon the first issue, but the respondent succeeded upon the second.

Held, on appeal from taxation of costs, 1. That the costs of the two separate libellants and of the respondent were to be taxed in both the two suits first commenced, up to the date of the consolidation; but from that date libellants' costs were to be taxed only in the suit which was thereafter prosecuted.

2. That full costs of the issue on which the libellants prevailed should be taxed in their favor, and full costs of the issue on which the respondent succeeded should be taxed to him; and that these two bills should be set off the one against the other, and the balance paid by the party from whom it might be due. *Simpson v. Caulkins*, 539.

17. This Court does not tax plenary costs when the sum in dispute does not exceed \$50, although the proceedings are plenary. *McGinnis v. Carlton*, 570.
18. Although the libellant, in his libel, claims a sum exceeding \$50, yet if upon the hearing he admits that an amount less than that sum is all that is due to him, and claims to recover only such lesser sum, he can recover only summary costs on a decree in his favor. *Ib.*
19. The cause would not be appealable to the Circuit Court in that condition of the demand. *Ib.*

STIPULATION.

COURTS.

JURISDICTION.

DAMAGES.

1. A cargo of goods, being in part damaged and in part sound, was sold at auction by the consignees, without separation of the sound from the unsound.

Held, that it was the duty of the master not of the consignees to make such separation, if requisite to obtain a favorable sale; and that the want of it did not prevent the consignees from relying upon the auction price as showing the value of the goods as damaged. *The Columbus*, 37.

2. How far sales at auction are sanctioned in such cases. *Ib.*
3. The rule of mutual contribution is not applied to cases of accidental collision from physical causes for which neither vessel is to blame; but each vessel in such case must bear her own loss. *The Moxey*, 73.
4. Where goods were damaged during transportation on board ship, and were received by consignees upon an understanding that the depreciation was to be made good to them, and they were sold by auction by the consignees, but with the assent of the master,—*Held*, that for the purpose of making adjustment of the amount due from the vessel for the injury, the sum realized at the sale should be regarded as the value of the goods in their damaged state. *The Columbus*, 97.
5. The general rule of damages applicable to collisions which are not wilful is, that the owner of the injured vessel is to receive a remuneration which will place him in the situation in which he would have been but for the collision. *The Rhode Island*, 100.
6. The owner of a vessel showing himself entitled to damages for collision, is entitled to compensation for the loss of the use of his vessel during the time consumed in making repairs. *Ib.*
7. In the absence of direct evidence of the amount of this item of loss, interest upon the value of the vessel for the time occupied in making repairs may be awarded as a fair compensation in this respect. *Ib.*
8. The rule of equal contribution should be applied in cases of damage caused by a collision for which both colliding vessels are mutually in fault. *The Bay State*, 235.

AFFREIGHTMENT, 3. COLLISION. COMMON CARRIER, 2. DEMURRAGE.

DECREE.

INTEREST. PRACTICE, 2, 3, 4, 12, 13.

DEFAULT.

Where a warrant of arrest, although containing a foreign attachment clause, gives no direction to bring the garnishee before the Court, nor any citation to him to answer the libel, a default entered against him for non-appearance on the return of the process is irregular. *Smith v. Miln*, 373.

WAIVER, 1.

DEMURRAGE.

1. *It seems that the consignee cannot be made liable for demurrage where there is in the charter-party or bill of lading no express agreement or stipulation in respect to it, or in respect to lay days. Sprague v. West*, 548.
2. The *freighter* is liable to the vessel for any unnecessary detention in loading or unloading, although no express contract is made on the subject; and compensation for such detention may be recovered under the name of demurrage. *Ib.*
3. Upon what principles demurrage for the unnecessary detention of a vessel while unloading, should be computed. *Ib.*

DEPUTY MARSHAL.

The deputy marshal is an officer of the District Court, amenable to its jurisdiction for malfeasance in office; and this jurisdiction may be exercised by summary order or attachment for contempt. *The Bark Laurens and \$20,000 in Specie*, 508.

MARSHAL.

DISCHARGE.

CONSULAR DISCHARGE.

ESTOPPEL.

1. A party cannot be allowed, after receiving a pleading and replying to it, to treat it, upon any ground of defect afterwards discovered, as a nullity, and proceed as if none had been served. *Gaines v. Travis*, 297.
2. Where the owner of property places it in the hands of another person, solely that the latter may make repairs, improvements, additions, &c., to it, and afterwards demands and receives the re-delivery of it, this is not an admission on the part of such owner that the services agreed for have been

performed, nor does it estop him from contesting the fact of the fulfilment of the agreement. *The Isaac Newton*, 11.

3. *It seems*, however, that such acceptance of the redelivery of the property may be regarded at law as an admission that the owner has received some benefit, and that the other contracting party is entitled to some remuneration for the work done. *Ib.*
4. Where, by the terms of a contract for building a steam-engine, the work was to be done under the superintendence of the employers, and to be paid for in instalments as it proceeded, and was to be finished at a specified time; and the work was protracted beyond that time, but the employers continued their superintendence, and made payments on account thereafter:—*Held*, that by so doing they acquiesced in the delay and estopped themselves from claiming damage therefor. *Ib.*

ACTION. BILL OF LADING, 3.

EVIDENCE.

1. A deed of assignment executed in another State, and attested by two subscribing witnesses, was offered in evidence, accompanied by proof of the signatures of one of the witnesses, and of both the assignors.
Held, 1. That the witnesses were presumed to reside at the place of execution and to be without the jurisdiction of the Court.
2. That the proof of the assignors' signatures was admissible as secondary evidence of the execution. *Manchester v. Milne*, 115.
2. In an action for wages brought since the Act of 7 & 8 Vict. ch. 112, the production of the certificate mentioned in the act is not required as an absolute condition precedent to a right of recovery by seamen, but is directed as a mode of proof which shall be sufficient, other legal means of evidence to show the fidelity of the seamen, and their title to wages, not being excluded. *Davis v. Leslie*, 123.
3. The testimony of the master of a foreign vessel that he had discharged a seaman in this port, will not be allowed, in a suit by the seaman, in this Court, against the vessel for wages, to countervail his official report to the consul of his nation, that the seaman deserted the ship. *The Infanta*, 263.
4. A report that a ship is seaworthy, made by marine surveyors, upon occasion of the crew demanding to leave her for unseaworthiness, is not conclusive against the crew, in a subsequent action for wages, after leaving. *Bucker v. Klorkgeter*, 402.
5. *It seems*, that where original shipping articles are proved before a commissioner, and redelivered to the vessel, who thereupon pursues her voyage, a copy certified by the commissioner is competent evidence upon the hearing. *Henry v. Curry*, 433.

6. To entitle an instrument to the respect accorded to documents under official signature and seal, the signature must be legible, and the impression of the seal sufficiently distinct to allow the vignette and motto to be distinguished. *The Atlantic*, 451.

CONTRACTS, 3, 4. ESTOPPEL. PRESUMPTION.

EXECUTION.

1. Under Rule 3 of the Supreme Court, the principal and his surety on the bond or stipulation given upon an arrest *in personam*, stand upon the same footing. *Holmes v. Dodge*, 60.
2. The award which grants execution upon a final decree, authorizes it against all parties embraced in the decree; and there is no necessity of special notice to the surety of respondent of an application for an execution against him. *Ib.*
3. Under the Rules promulgated by the Supreme Court, execution properly issues against stipulators, summarily upon the decree rendered against their principals; the giving the stipulation being regarded as a submission by the stipulator to such decree as may be rendered against the party for whom he is bound. *Gaines v. Travis*, 422.

FEEES.

1. Since the adoption of the Circuit Court Rules of 1845, Rule 96 of the District Court of 1838, refusing to a proctor in a suit fees as advocate, is abrogated in respect to all fees other than those specifically introduced and appointed by the District Court; and fees for services as proctor and as advocate are taxable to the same person. *Manchester v. Milne*, 158.
2. If the former Rules of the District Court respecting security to be given for costs may be considered as still in force for the purpose of protection to the officers of the Court for the recovery of their fees, this is not a matter which affects the libellant, and he is not entitled to ground any proceeding on the omission of the respondent to give the security prescribed by those rules. *Gaines v. Travis*, 297.

FOREIGN ATTACHMENT.

1. In order to authorize proceedings in a suit prosecuted in a Court of Admiralty by foreign attachment, to be carried on against the garnishee personally, it is necessary that the warrant or process served upon him should contain a summons or notice, warning him of the claim in suit, and citing him to appear and answer. *Smith v. Miln*, 373.

2. The primary purpose of the attachment is to effect the appearance of the defendant in the action, and not that of the garnishee. *Ib.*

FOREIGNERS.

JURISDICTION, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 16.

FORFEITURE.

SEAMAN'S WAGES, 7, 8, 9, 10, 11.

FREIGHT.

1. Where a vessel puts in at an intermediate port in distress, and it is there found that a portion of the cargo has been rendered worthless by perils of the sea, while the residue is not of sufficient value to warrant continuing the voyage, and such portion is therefore sold by the master and the voyage broken up, no claim for freight, either in full or *pro rata*, or upon a *quantum meruit*, can be maintained by the ship-owner against the shipper. *The Ann D. Richardson*, 499.
2. Upon what principles the general average should be adjusted in such a case, as respects the contribution due from the cargo. *Ib.*

AFFREIGHTMENT, 8, 9.

GARNISHEE.

FOREIGN ATTACHMENT.

GUARDIAN AD LITEM.

In an action by a minor to recover wages as seaman, the respondent is not entitled to require the appointment of a guardian *ad litem* or next friend for the libellant. *Wicks v. Ellis*, 444.

HUSBAND AND WIFE.

WITNESS, 5.

INTEREST.

1. Where, by the terms of a contract for work and materials, a part of the contract price is to be paid in instalments as the work advances, the em-

ployer is not entitled on the adjustment of a decree for a balance remaining due on the work, to be credited with interest on the payments made by him while it was advancing. *The Isaac Newton*, 588.

2. Where a party contracting to furnish labor and materials has completely fulfilled the contract on his part in due time, he is entitled to recover in a suit for the compensation stipulated by the contract, interest on the amount due him, at least from the commencement of the suit. *Ib.*
3. But where, in such case, the right of the party to recover his compensation under the contract is doubtful and contested on reasonable grounds, and the amount due him requires to be adjusted by the proceedings in the suit, interest is only recoverable after the right of the party to recover, and the amount of his recovery have been determined. *Ib.*
4. If in such case the report of referees fixing the amount due to libellant is ultimately confirmed, he will be entitled to interest from the filing the report, although both parties have excepted to the report, and prosecuted their exceptions to a hearing with a view to have it set aside. *Ib.*

JOINDER OF ACTIONS.

1. A seaman who claims to recover both for wages and for moneys advanced to the ship's use, may join in a libel *in rem* with a co-libellant claiming wages only. *The Sloop Merchant*, 1.
2. A claim for seamen's wages and a claim for moneys advanced to the use of the ship may be united in one action against the ship. *Ib.*
3. Where the vessel is liable to two libellants for wages, for which, under the practice of the Court in respect to the consolidation of suits, they may be compelled to sue in common, they may join in one action *in rem*, not only in suing for the common demands, but also in respect to other claims which are peculiar to each. *Ib.*
4. Where both the vessel and the master or owner are conjointly liable, the personal remedy, and the remedy against the vessel, may be sought in one and the same action. *Ib.*
5. Rule 13 of the Supreme Court interdicts the blending of an action against the owner personally, with one against the vessel, for the recovery of wages. *Ib.*
6. A claim for wages, and for moneys advanced to the use of a vessel on the part of one libellant, cannot be joined, in an action *in personam*, with a separate claim for wages alone, on the part of another. *Ib.*
7. There is no abstract incompatibility between proceedings *in rem* and proceedings *in personam*, which forbids them to be joined in one action where such joinder is calculated to advance the ends of substantial justice. *The Zenobia*, 48.

8. Where both the vessel and the master or owner are conjointly liable upon a contract of affreightment, the personal remedy, and the remedy against the vessel, may be sought in one and the same action. *Ib.*

JURISDICTION.

1. The maritime courts of this country and of England are not without jurisdiction over actions, whether *in rem* or *in personam*, between foreigners. *Davis v. Leslie*, 123.
2. But as a general rule, both the American and the English courts will decline to entertain such actions, excepting where it is manifestly necessary that they should do so, to prevent a failure of justice. *Ib.*
3. The Admiralty Courts of the United States will decline jurisdiction of controversies arising between foreign masters and crews, unless the voyage has been broken up or the seamen unlawfully discharged. *The Infanta*, 263.
4. It is expected that a foreign seaman, seeking to prosecute an action of this description in the courts of this country, will procure the official sanction of the commercial or political representative of the country to which he belongs; or that good reasons will be shown for allowing his suit in the absence of such approval. *Ib.*
5. There is no authority of weight which imposes on the courts of our own country the necessity of determining controversies between foreigners resident abroad, either in common-law proceedings, transitory in their nature, or in maritime suits prosecuted *in rem*. *One Hundred and Ninety-four Shawls*, 317.
6. It rests in the discretion of a Court of Admiralty whose aid is invoked to the settlement of a controversy between *foreigners*, to hear and determine it, or to remit the parties to their home forum. *Ib.*
7. What considerations will govern a Court of Admiralty in determining to exercise or decline jurisdiction of a suit between foreigners? *Ib.*
8. As a general rule, where the only question in a salvage suit is as to the rate of reward, and the salvaged property is within the jurisdiction of the Court, a Court of Admiralty, in this country, will entertain the suit, notwithstanding that all the parties are foreigners. *Ib.*
9. *It seems*, that when in a salvage suit between foreigners, the answer charges the libellant with wanton misconduct in obtaining possession of the property, and prays the privilege to contest the claim of the libellant before the courts of their common country, the case should be dismissed to the home forum. *Ib.*
10. A Court of Admiralty has no jurisdiction to afford a remedy, either *in rem* or *in personam*, for the breach of an executory contract for personal

services to be rendered to a vessel in port, in lading or unlading her cargo. *Cox v. Murray*, 340.

11. In order to clothe a contract with the privilege of a remedy in the Admiralty Courts, the subject-matter of the contract must be maritime in its nature. This is the case only when the matter done, or begun to be done under the contract, regards the fitment of the vessel herself for the voyage,—aid and assistance rendered on board her in prosecuting the voyage,—or the employment of her as the vehicle of a voyage. *Ib.*
12. The maritime courts of this country and of England are not without jurisdiction over actions, whether *in rem* or *in personam*, between foreigners. *Bucker v. Klorkgeter*, 402.
13. But as a general rule, both the American and English courts will decline to entertain such actions, excepting where it is manifestly necessary that they should do so, to prevent a failure of justice. *Ib.*
14. *It seems* that a deviation from the voyage for which foreign seamen shipped, is not a ground upon which our courts should entertain jurisdiction of a suit for wages, where, by the articles, the libellants have stipulated to sue in their own country only. *Ib.*
15. Unseaworthiness of a vessel releases the crew from obligation to sail with her, and on showing such condition of the vessel, and that they left her on that account, they may maintain an action *in personam* for wages here, although all parties are foreigners, and are under agreement not to sue while abroad. *Ib.*
16. Under the practice in this country, the approval of the consul, or other representative of the nation to which foreign seamen belong, is not absolutely necessary to the maintaining of a suit between them. *Ib.*
17. A Court of Admiralty has not jurisdiction of an action to recover wages for services in a voyage upon a canal not connecting navigable lakes or different States or Territories. *McCormick v. Ives*, 418.
18. Nor will the fact that a small portion of the voyage is through public navigable waters, give jurisdiction, if the main end contemplated by the contract was a service upon such canal. *Ib.*
19. The authority of the District Court, in cases pending on appeal, extends only to the protection of parties against unreasonable delay. *The Josephine*, 481.
20. To impart a maritime character to personal services rendered in or upon a vessel, they must be connected with the reparation or betterment of the vessel, or be rendered in aid of her navigation directly by labor on the vessel, or in sustenance and relief of those who conduct her operations at sea. *Gurney v. Crockett*, 490.
21. A person employed to visit a vessel at anchor, from time to time, to see to her safety, ventilate her, try her pumps, and the like, cannot maintain a suit in Admiralty to recover his compensation for such services. *Ib.*

22. But if, in the course of such employment, a necessity arises that such keeper should get the ship under way, and navigate her from one anchorage to another, this is a maritime service for which libellant may recover in a Court of Admiralty. *Ib.*
23. The resignation of office by an officer of the Court, does not oust the Court of jurisdiction to proceed against him by attachment for contempt for any acts of misconduct committed by him while in office. *The Bark Laurens and \$20,000 in Specie*, 508.
24. Work done upon a vessel in the dry dock, in scraping her bottom preparatory to coppering her, is not of a maritime character; and compensation for such labor cannot be recovered in a Court of Admiralty. *Bradley v. Bolles*, 569.

ACCOUNT. SHIPPING ARTICLES, 1, 2.

LIBEL.

PLEADING. VERIFICATION.

LIEN.

- Where an agreement is entered into between the master of a vessel and a passenger, for the transportation of the latter, with his baggage, and passage money is paid in advance, and the agreement is unperformed through the fault of the master, the ship is liable, *in specie*, to refund the advance passage-money, and to pay damages for any failure to deliver the goods shipped. *The Zenobia*, 48.
- In respect to the liability of the ship for contracts made with the master for transportation for hire in the regular course of the vessel's occupation, the law makes no distinction between the transportation of passengers and of merchandise. *Ib.*
- The libellant, a blacksmith, solicited the engineer of a domestic steamboat running daily between New York and Albany, to employ him in making such repairs as should be required during the season by the boat, in the line of his trade. The engineer promised this, and the libellant was called upon to make, and did make repairs upon the boat at various distinct times, sending in his bills monthly.
Held, 1. That these facts did not constitute an employment for the season, but that the libellant had a right of action for each distinct job when it was completed.

2. That libellant's lien upon the boat, if any, under the provisions of 2 Revised Statutes, 405, § 2, for each item of service rendered by him, was discharged on the lapse of twelve days after the departure of the boat from

Albany for New York next following the rendering of such service. *The Alida*, 165.

4. The Court affords a remedy against domestic vessels for labor, supplies, &c., furnished, only where the vessel is subject by the local law to a lien therefor; and the privilege is enforced subject to every qualification or limitation attached to it by that law. *Ib.*
5. A steamboat is subject to a lien under 2 Revised Statutes, 493, for fuel furnished her for the purposes of her navigation. *Ib.*
6. The lien for labor, supplies, &c., furnished to vessels, given by 2 Revised Statutes, 493, takes effect from the time when the benefit is actually conferred, not from the date when it is engaged or contracted for. *Ib.*
7. Ships carrying passengers for hire stand upon the same footing in respect to their responsibility *in rem* for the performance of the passage contract, with those carrying merchandise on freight. *The Aberfoyle*, 242.
8. When a lien is claimed for labor and materials furnished in fitting out a vessel for sea, the Admiralty Courts of the United States observe the *lex loci contractus*, and grant or refuse the remedy sought, according as it is allowed or denied by that law. *The Infanta*, 263.

MASTER, 1. PASSENGER, 1, 2. SEAMEN, 4, 5, 6, 7, 8, 9.

MARSHAL.

The marshal is personally answerable (under *Sup. Ct. Rules*, 41, and *Dist. Ct. Rules*, 158) for any failure to pay moneys attached by him, into Court forthwith; and the responsibility of the deputy is no less stringent than that of the marshal. *The Bark Laurens and \$20,000 in Specie*, 508.

MASTER.

1. A delay of the master to present to the custom-house officers at the port of consignment a proper manifest, by which delay the owner of goods shipped on board is unable to pass them through the custom-house, is a neglect of his duty as a master, for which the vessel is responsible. *The Zenobia*, 80.
2. It is well settled in this country, that the master, as such, has authority to sell a wrecked vessel, when he proceeds in good faith, exercising his best discretion for the benefit of all concerned; and this whether the sale is made in view of a peril then involving the vessel, or of one likely to ensue, from which, in the opinion of persons competent to judge, she cannot be rescued. *The Lucinda Snow*, 305.
3. The employment of a master to take command of a vessel for a foreign voyage, is usually a circumstance so notorious that there can seldom be

- wanting definite and decisive evidence by which the fact of such employment may be established. *Jones v. Davis*, 446.
4. There is, moreover, no incompatibility between the employment of one person as master to superintend the loading and preparing a vessel for sea, and the engagement of another person to take the command of her upon the voyage. *Ib.*
 5. When, therefore, one claiming under an alleged employment as master for a foreign voyage seeks to establish such employment, merely by inference from services rendered and acts performed by him, under authority of the owners, in making the vessel ready for sea, the Court will require that the evidence shall be so strong as to exclude all reasonable doubt that an employment for the voyage was intended. *Ib.*
 6. The master, although agent for the ship and cargo to the extent of being empowered, in a case of extreme urgency, to sell either or both, is not authorized to accept the cargo on behalf of its owner short of the port of delivery. *The Ann D. Richardson*, 499.

DAMAGES, 1, 2. EVIDENCE, 3. LIEN, 1, 2. PASSENGER. SALE.
SALVAGE, 8. SEAMEN, 10, 11.

MISNOMER.

Maritime courts will not lay much stress on an objection of misnomer unsupported by evidence that the party was in fact not known by the name ascribed to him. *Henry v. Curry*, 433.

MONEY IN COURT.

1. Where specie, although consisting of foreign coin, is attached under process of the Court, the officer is bound to pay it into Court as *money*; and it is not to be considered as *cargo* merely. *The Bark Laurens and \$20,000 in Specie*, 508.
2. Under the Act of April 18, 1814, (3 *U. S. Stats.* 127,)—which directs that moneys received by officers of the United States Courts shall be deposited in bank, &c.,—the Court is authorized to require its officers to pay moneys received by them into Court, to be deposited in bank by the clerks of the Court. *Ib.*

MOTION.

1. A motion to discharge respondent from arrest, on the ground that the libellant has no legal cause of action against him, will not be granted where the affidavits read upon the motion in behalf of the respective parties, are contradictory as to the merits of the cause. *Hicks v. Ellis*, 444.

2. A motion to dismiss an appeal taken from a decree in the District Court to the Circuit Court, must be made in the Circuit Court. *The Josephine*, 481.
3. A motion to set aside an arrest, founded on irregularity in the libellant's proceedings, is not within Rule 25 of the Circuit Court, and will not be denied of course, merely because it was not made at the earliest day practicable after the arrest. *Martin v. Walker*, 579.

COSTS, 7, 8.

NEGLIGENCE.

The failure to keep out a good light during the night, and the failure to maintain a sufficient watch on deck, are either of them acts of culpable negligence, which will prevent a vessel from recovering damages for a collision. *The Indiana*, 330.

NOTICE.

1. Under the Act of Congress of March 2, 1799, (1 *U. S. Stats.* 696, § 90,) the notice of sale in cases of condemnation under the act must be published every day for fifteen days, in the newspapers directed by the act. *The Hornet*, 57.
2. Under Rules 47 and 48 of the District Court, notice of sale under *venditioni exponas*, (except on condemnation of property on seizure by the United States,) must be published for *six* days; and the sale will be set aside if this full number of publications is not made. *Id.*

PRACTICE, 13.

OFFICER.

DEPUTY MARSHAL. FEES, 2. JURISDICTION, 23. MARSHAL. MASTER. SEAMEN, 2, 3.

PARTIES TO ACTION.

1. Where an attorney in fact of an absent owner of property, intervened on his behalf by claim and answer, and the owner afterwards came within the United States, and moved to be allowed to defend in his own name,—*Held*, that he was entitled to do so on payment of costs of opposing the motion, and on entering into a new stipulation for costs. *The Bark Laurens and \$20,000 in Specie*, 302. •

2. Original proceedings taken in a Court of Admiralty against vessels captured in war by a public vessel, to divest the former ownership and to confiscate the captured property, should be taken in the name of the government under whose authority the capture was made, and not in the names of the individual captors, unless express authority is given to the latter to sue in their own names. *Proceeds of Prizes of War*, 495.
3. But where the *proceeds* of prizes have been brought into Court, the parties entitled to distributive shares therein may file their libel in their individual names. *Ib.*

PARTNERSHIP.

ACCOUNT.

PASSENGER.

1. Where libellant contracted with the master in a foreign port for a passage to this country, and paid a part of his passage-money in advance, but the master failed to fulfil his contract, and libellant was obliged in consequence to take passage in another vessel,—*Held*, that the vessel was responsible for the fulfilment of the agreement; and that the libellant was entitled to recover from her the passage-money paid in advance, the expenses incurred by him in awaiting the sailing of another ship, and the sum paid by him to such second vessel for his passage in her. *The Zenobia*, 80.
2. Ships carrying passengers for hire are liable *in rem* for wrongful acts of the master in his capacity as such; but not, *it seems*, for acts of mere personal private malice or ill-will. *The Aberfoyle*, 242.
3. Where a passenger is put on short allowance by the master, the latter will not be presumed to have acted from personal malice; and if such short allowance be a violation of the passage contract, the ship will be held liable unless it is shown that the master's conduct was malicious and wrongful. *Ib.*

LIEN, 1, 2, 7.

PAYMENT.

MONEY IN COURT. SEAMEN'S WAGES, 6.

PERILS OF THE SEAS.

1. The phrases "the dangers of the seas," "the dangers of navigation," and "the perils of the seas," employed in bills of lading, are convertible terms. *Baxter v. Leland*, 348.
2. Wherever a cause of injury to a cargo lies very near the line which separates excusable perils of the seas from those dangers for which carriers are

responsible, regard is to be had to the custom of the trade in determining whether it is to be classed with perils of the seas or not. *Ib.*

3. A dampness or sweating of the hold of a vessel, shown to be the ordinary accompaniment of a voyage from southern to northern ports, and to result not from tempestuous weather, but from occult atmospheric causes, is not a "peril of the seas." *Ib.*

PILOTAGE.

1. Whether, under the established usage among steamboats plying upon the Hudson River, the mere hiring of a pilot at monthly wages, effected prior to the commencement of the season of navigation, carries with it an implied engagement that the employment shall continue throughout the entire season,—*Query?* *Truesdale v. Young*, 391.
2. Whether such engagement could be implied where the hiring was effected after the season was partly over,—doubted. *Ib.*
3. There is no statute in force regulating the compensation payable for pilotage service rendered through Sandy Hook channel. *Love v. Hinckley*, 436.

4. The former laws upon this subject reviewed. *Ib.*

5. The libellants piloted a vessel partially crippled, but not in immediate peril, nor unnavigable, through the Sandy Hook channel, and claimed extra fees, as for a vessel in distress, on the ground of usage of the port.

Held, 1. That the proofs in the cause did not authorize the Court to say, that the term *distress* was by the usage of the port applicable to the condition of the vessel in question.

2. That the proofs did not show a usage of charging and paying double fees as a legal right, even for services rendered to a vessel in distress.

3. That the libellants were entitled to a reasonable extra compensation to be fixed by the Court, for the increased responsibility and effort presumably incurred in consequence of the crippled condition of the vessel. *Ib.*

PLEADING.

1. In Admiralty no decree can be rendered upon proofs merely, when the subject-matter of those proofs is not embraced within the pleadings. The decree must conform to the *allegations* of the parties. *Davis v. Leslie*, 123.
2. Where a sworn answer is not demanded by the libel, the libellant may contradict its allegations, by proofs, without filing a replication thereto, or notice of such proof. *The Infanta*, 263.
3. In answer to a libel for wages, the claimants set up a stipulation in the shipping articles in bar of the recovery. The libellant served a replication

in the usual form, but contended, upon the trial, that the stipulation relied upon was void.

Held, 1. That so far as the claim to treat the stipulation as void might rest upon any matters of fact outside the stipulation itself, the question was not raised by the general replication; but the libellant ought, either by an amendment of the libel or by a special replication, to have introduced into the pleadings averments contesting or avoiding the apparent bar contained in the stipulation.

2. That the question, whether the stipulation was not void in point of law in itself considered, and apart from any extraneous facts, might be raised on the general replication, and should be considered as if it had arisen upon demurrer or exception to the answer. *The Atlantic*, 451.

4. Where, in answer to a libel for wages, the claimants set up a discharge of libellant in a foreign port by order of the consul, it is incumbent on them to set forth in their answer a state of facts justifying the discharge relied on, and to support the allegations by adequate proof. *Ib.*

AMENDMENT.

PRACTICE.

1. The history of the distinction between proceedings *in rem* and *in personam*, reviewed. *The Sloop Merchant*, 1.
2. To entitle the claimant or respondent, in Admiralty, to claim judgment against the libellant preliminarily, on the ground that his right of action did not mature until after the suit was commenced, the objection must be raised by plea in abatement or demurrer. *The Isaac Newton*, 11.
3. And where such plea has not been interposed, the Court will not pronounce against the action merely on the ground that it was prematurely brought, if the right of action is perfected before the final hearing. *Ib.*
4. In such cases parties will be protected, in the adjustment of costs, from any injustice arising from a too early commencement of the suit. *Ib.*
5. An objection to the *regularity* of a commissioner's report cannot be brought forward by *exception* to the report; but should be raised by *motion* founded upon the irregularity. *The Columbus*, 37.
6. An exception to a commissioner's report draws in question only the reasons upon which the report is founded. *Ib.*
7. Where a libel is filed for a cause of action upon which both vessel and master may be together liable, the Court will not make an order that the libellant elect between the remedy *in rem* and that *in personam*, nor that he submit to have either the arrest of the respondent or the attachment against the vessel vacated. *The Zenobia*, 48.

8. The legality or propriety of an order of reference cannot be impeached upon exception to the report. *The Rhode Island*, 100.
9. The practice of the English Admiralty and the former practice of the District Court, in respect to the security required to be given by a respondent arrested upon bailable warrant, in order to authorize his discharge from the arrest,—stated. *Gardner v. Isaacson*, 141.
10. An irregularity of practice must be objected to by the party affected by it, within the term of the Court next subsequent to its becoming known to him. *The Infanta*, 327.
11. The practice of Courts of Admiralty in respect to the process of foreign attachments,—defined. *Smith v. Miln*, 373.
12. There is no rule of practice governing proceedings in Admiralty suits in the District Court which requires either party to give the other notice of a final decree, otherwise than by adopting the proper means for enforcing it. *Gaines v. Travis*, 422.
13. A decree from which an appeal may be taken, cannot be executed within ten days after it has been rendered; but the delay is for no other purpose than to favor the right of appeal, and the mere entry of the decree is notice to all parties. *Id.*
14. Where the United States District Attorney authorizes a suit for the condemnation of a prize to be filed in the names of the individual captors, the Court will allow the proceedings to be so conducted, instead of requiring that the suit be instituted on behalf of the government. *Proceeds of Prizes of War*, 495.

ACTION. AMENDMENT. ARREST. BAIL. COSTS. DEFAULT. ESTOPPEL. FOREIGN ATTACHMENT. GUARDIAN AD LITEM. INTEREST. JOINDER OF ACTIONS. JURISDICTION. MISNOMER. MONEY IN COURT. MOTION. NOTICE. PARTIES TO ACTIONS. PLEADING. REFERENCE. SALVAGE, 4. STIPULATION. VARIANCE. VERIFICATION. WAIVER. WITNESS.

PRESUMPTION.

1. Where, in the case of a contract for services in which no definite term of service is expressed, there is proof that the party claiming to have been hired as pilot represented the engagement was terminable at his option, this affords a strong presumption that it was terminable, also, at the option of the other party. *Truesdale v. Young*, 391.
2. In defence to a libel for wages as cook and steward by one William Henry, respondent put in shipping articles executed by William Henderson as cook and steward. *Held*, that the presumption was that the libellant was the person who had entered into the articles. *Henry v. Curry*, 433.

BILL OF LADING, 7. MASTER, 3, 4, 5.

PRINCIPAL AND SURETY.

BAIL. EXECUTION.

PROCEEDS.

MONEY IN COURT. PARTIES TO ACTIONS, 2, 3.

PROCTOR.

FEES, 1.

REFERENCE.

1. Where a cause is referred to experts to ascertain and report upon facts appertaining to their calling or experience, it is the settled rule, both at law and in Admiralty, to adopt the decision of the referees, unless there is a manifest preponderance of testimony against it. *The Isaac Newton*, 588.
2. Where, upon reference to a commissioner, there is a conflict of testimony upon a question of fact, the Court will adopt the conclusion of the commissioner, unless there is a palpable preponderance of evidence against it. *Holmes v. Dodge*, 60.

COSTS, 1, 2, 3. PRACTICE, 5, 6, 8.

REPLICATION.

PLEADING, 3.

SALE.

1. The purchaser of a wrecked vessel from the master is not bound, in order to maintain his title, to furnish direct and positive evidence of the honesty of the master's conduct and of the necessity of the sale; but presumptive proof of those facts is sufficient. *The Lucinda Snow*, 305.
2. The circumstance that the master who has sold a stranded vessel believed at the time that he could get her off, would be pertinent to show bad faith avoiding the sale; but proof that the purchaser believed himself able to rescue the vessel, can have no such effect. *Ib.*
3. The degree of necessity which justifies the sale of a wrecked vessel by the master,—defined. *Ib.*

SALVAGE.

1. Salvage service is such service as is rendered in rescue or relief of property at sea, in imminent peril of loss or deterioration. *The H. B. Foster*, 222.
2. Where there is a hiring or bargain *bonâ fide*, and free from fraud or mistake, for aid to be rendered by one vessel to another in distress, the terms of such agreement are adhered to as the rule of compensation; but where no agreement is made, the rate of remuneration for such services is to be governed by the considerations applicable to salvage cases. *Ib.*
3. A vessel laden with a valuable cargo, being overtaken by a storm while entering the harbor of her port of destination, was left by her crew, wholly crippled and unnavigable, and in a situation where a recurrence of severe weather might have produced a total loss, yet lying in the mouth of the harbor and within ready reach of assistance. A steamer, engaged in the business of towing vessels to and fro in the harbor, went out to her relief, reaching her just as another steamer of like occupation was approaching, with a view to render similar assistance, and took her in tow and brought her up to the wharf; the entire time consumed being five hours, and the severity of the storm having abated.
Held, 1. That this was a case for salvage compensation, and not one of mere towage service.
 2. That it was not a case of legal derelict, nor one entitling the salvors to extraordinary compensation.
 3. That \$250 was a reasonable compensation for the service rendered. *Ib.*
4. A Court of Admiralty will not order a salvage suit to be set aside or to be stayed because there is pending in a court of law an action of replevin for the salvaged property, brought by the owner against the salvor, and in which the validity of the salvor's lien upon the property may be determined. *A Raft of Spars*, 291.
5. The rescuing a raft of timber found adrift in harbor, and floating out to sea unaccompanied by any person, is in its nature a maritime salvage service, for which salvage compensation may be awarded. *Ib.*
6. The law governing such cases in England,—considered. *Ib.*
7. The considerations which should govern the Court in adjusting the amount of salvage compensation, and its distribution amongst the salvors, in case of timber found adrift and rescued, stated. *Ib.*
8. An action for compensation for salvage services, rendered to a vessel, cannot be maintained *in personam* against the master, unless it was performed for his benefit. *Miller v. Kelly*, 564.
9. No claim for salvage can be maintained by the crew of a vessel upon the

ground that by their services she is brought through a storm into port, sound in hull. *Ib.*

JURISDICTION, 10. TOWAGE.

SEAMEN.

1. The right of seamen to leave the vessel on the ground of her being chartered for a voyage in gross deviation from that for which they shipped, will not justify them in taking possession of the vessel while at sea. *The Mary Ann*, 270.
2. Seamen are authorized under the general maritime law to prevent or restrain their officers from the commission of open and flagrant crimes in the ship, attempted in the presence of the seamen. *Ib.*
3. But the crew are not justified, by circumstances affording reasonable ground of suspicion merely that the master is about to engage the vessel in the slave-trade, in taking possession of her at sea, or in a foreign port, and bringing her back to her home port; and their undertaking so to do, forfeits both the wages already earned and those for the residue of the voyage. *Ib.*
4. A seaman is entitled to be cured at the expense of the ship, of sickness, hurts, wounds, &c., incurred in the service of the ship. *Ringold v. Crocker*, 344.
5. The phrase "service of the ship" is not confined in meaning to acts done for the benefit of the ship, or in the actual performance of the seaman's duty. *Ib.*
6. A sailor must, in judgment of law, be deemed in the service of the ship while under the power and authority of its officers; and he is entitled to be cured at the expense of the ship of any injury received by him in executing an improper order, or inflicted upon him directly by the wrongful violence of an officer of the ship in the exercise of his authority as officer to punish him. *Ib.*
7. A mariner receiving injury in the performance of his duty is entitled to be treated and cured at the expense of the ship; and this is equally true, whether his compensation is by specific money wages, or by a share in the earnings of the vessel. *The Atlantic*, 451.
8. As a general principle, the liability of the ship in this regard is limited to the reconveyance of the disabled mariner to the United States, or to such period of time as may be reasonable, to enable him to return thither; but this rule is liable to variations. *Ib.*
9. Where a seaman ships "by the run" or "by the voyage," the vessel, although detained at an intermediate port by stress of weather, is bound to maintain him while he remains attached to her, whether his services are useful to her or not. *Miller v. Kelly*, 564.

10. The master of a vessel is entitled to call upon the ship's cook to perform service as a seaman, so far as he possesses the requisite experience and ability. *Allen v. Hallet*, 573.
11. Where a seaman deserts from the vessel while in port, and another hand is shipped in his place, and he afterwards returns and secretes himself on board, and is discovered by the master after the ship has left port, the master is entitled to call upon him to perform any service as seaman which may be within his ability; but is not entitled to assume that he is an able seaman, and to require him to do duty as such. *Ib.*

CONSULAR DISCHARGE. GUARDIAN AD LITEM. SALVAGE, 9. SHIPPING ARTICLES.

SEAMEN'S WAGES.

1. The Act of 7 & 8 Vict. c. 112, § 17—authorizing the recovery of seamen's wages notwithstanding the loss of the ship before earning freight, provided the seaman shall produce a certificate to the fact that he exerted himself to save the ship, cargo, &c.,—does not operate to create a new right of action formerly unknown, but only by way of removing a disability which the rules of maritime courts previously imposed. *Davis v. Leslie*, 123.
2. Hence the action, in such cases, is not upon the statute, nor upon any right created thereby, but upon the contract to pay wages. *Ib.*
3. A bottomry creditor may, by payment of the seamen's wages, entitle himself to a novation in their place for recovery of their demands against the vessel. *The Cabot*, 150.
4. But he has no right to exact of them a formal assignment of their wages, nor the payment of his proctor's fees; nor, on an offer to satisfy their wages, can he require them to defer the prosecution of their demands until he chooses to institute a suit on the bottomry. *Ib.*
5. On the discharge of a seaman, his wages become immediately payable; and the Act of Congress of July 20, 1790, does not compel seamen discharged from their ship to wait until the expiration of ten days after the discharge of the cargo before bringing a suit. *Ib.*
6. When payment of wages is made to an American seaman at a foreign port, in foreign coin, on the sale of the ship, the breaking up of the voyage or the discharge of the seaman by the master, such coin is to be valued at its rate in the home port, under the laws of the United States; but foreign coin is to be estimated at its value at the place of payment, if the payment is a voluntary advance on the part of the master, made with the assent of the seaman. *Ib.*
7. For a seaman wilfully to do any act which puts the vessel in jeopardy,—e. g. for one to violate a notorious excise law, by smuggling,—is a breach of the duty which he owes to the ship. *Scott v. Russell*, 258.

8. Such breach of duty may be considered in diminution or in bar of the seaman's wages; it being an offence in the nature of barratry, causing loss and delay to the vessel, for which he would justly be subject to make amends, by forfeiture or subtraction of wages. *Ib.*
9. The theft of a portion of a cargo, by a mariner, works an absolute forfeiture of wages. *Alexander v. Galloway*, 261.
10. The fact that the seaman has been acquitted on a criminal trial for the larceny of a part of the cargo, is not conclusive to rebut the charge when set up as a defence against his suit for wages. *Ib.*
11. *It seems* that seamen employed on board a vessel forfeited under the Act of 1800, (2 *U. S. Stats.* 70,) as fitted out for the slave-trade, are entitled to wages, notwithstanding the forfeiture, if they were not knowingly or willingly connected with the criminal purpose of the voyage. *The Mary Ann*, 270.

CONSULAR DISCHARGE. COSTS, 9, 11, 14, 16. EVIDENCE, 2, 3, 4. GUARDIAN AD LITEM. JOINDER OF ACTIONS, 1, 2, 3, 4, 5, 6. JURISDICTION, 10, 14, 15, 17, 18, 20, 21, 22, 24. SEAMEN, 3. SHIPPING ARTICLES.

SEAWORTHINESS.

EVIDENCE, 4. JURISDICTION, 15.

SHIP-KEEPER.

JURISDICTION, 21, 22.

SHIPPING ARTICLES.

1. A stipulation in shipping articles, by which the master and crew of a foreign vessel, about to sail to this country, agree that they will not sue in any courts abroad, but will refer all disputes to the courts of their own country for adjudication, is lawful and binding, and will, in general, be respected and enforced by the American courts. *Bucker v. Klorkgeier*, 402.
2. But where the interests of justice require it to be disregarded—*e. g.*, where the voyage is broken up in an American port, by some other cause than the wreck of the vessel, or where the man is discharged or becomes entitled to a discharge by reason of improper treatment—the American courts will entertain a suit by a foreign seaman for his wages, notwithstanding his stipulation in the articles not to sue until his return home. *Ib.*
3. As a general rule, seamen are competent to bind themselves by a contract with the master and owners; and in the ordinary case of a hiring for

money wages at a specific rate, the contract of the seaman in respect to the rate will be upheld. *The Atlantic*, 451.

4. The contract of a seaman in respect to his compensation will likewise be upheld where the mode of compensation contemplated is by a proportional division of the earnings of the vessel among the owners, officers, and crew. *Ib.*

5. Shipping articles entered into for a whaling voyage, and contemplating the payment of the officers and crew by "lays" or shares in the vessel's earnings, contained a stipulation that either of the officers or crew who might be prevented by any cause from performing their duty during the whole of the voyage, should receive of his lay only in proportion as the time served by him should be to the whole time of the voyage.

Held, that this stipulation would be sustained; even without evidence that special explanation of it was made to the seaman. *Ib.*

6. A mariner who ships "by the run," takes the risk of adverse weather and of other kindred accidents attendant upon maritime enterprise; and if the vessel be driven out of her course by stress of weather, and obliged to take shelter in an intermediate port, and is there detained, the seaman has no claim for additional compensation for extra services thus required. *Miller v. Kelly*, 564.

EVIDENCE, 5.

STATUTORY CONSTRUCTION.

Doubtful words in a general statute may be expounded with reference to a general usage; and when a statute is applicable to a particular place only, such words may be construed by usage at that place. *Love v. Hinckley*, 436.

ARREST, 1, 2, 4, 5.

STEAMBOAT.

COLLISION, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20. CONTRACT, 1, 2, 4. LIEN, 3, 5.

STIPULATION.

1. After a bond has been given by a respondent to the marshal, in compliance with the rules of the Supreme Court, the libellant cannot exact any additional stipulation. *Gaines v. Travis*, 297.
2. An increased stipulation for costs should not be required from the claim-

- ants on account of a delay in the progress of the action, occasioned or obtained by the libellants. *The Bark Laurens and \$20,000 in Specie*, 302.
3. The requisites of a valid stipulation in Admiralty—considered. *The Infanta*, 327.

ARREST, 2, 3. BAIL, 2. EXECUTION. WAIVER, 2, 3.

TOWAGE.

1. Towage service is aid rendered in the propulsion of a vessel, &c., irrespective of any circumstances of peril. *The H. B. Foster*, 222.
2. There is no determinate rule of law absolutely distinguishing towage service from salvage service. *Ib.*
3. Towage may be a salvage service, when performed in aid of a vessel in distress. *Ib.*

USAGE.

It seems that there is no settled usage among those navigating the Hudson River, which requires vessels anchoring over night to take up a position within any particular limits as respects the shore; nor any usage justifying a steamboat making a night trip, in dispensing, while running in the middle of the river, with any care or precautions to avoid collision, which she would be bound to take if running near the shore. The Indiana, 330.

BILL OF LADING, 5. PILOTAGE, 1, 5. STATUTORY CONSTRUCTION.

VARIANCE.

Where the defence in the answer, in a cause of collision between a schooner and a steamboat, rested on faults imputed to the schooner in holding her course across the bows of the steamer under circumstances in which it was her duty to have gone about; and the defence set up by the proofs rested upon faults committed on the part of the schooner in an attempt to come about abruptly, and falling off or drifting in the attempt, against the steamer,—*Held*, that the latter defence was a deviation from the answer; and that under the pleadings the claimants were not entitled to the benefit of it. *The Washington Irving*, 336.

AFFREIGHTMENT, 4. BILL OF LADING, 1.

VERIFICATION.

1. When a libel is verified by an attorney in fact of the libellant,—as in case of the libellant's absence, &c.,—it is not necessary that the authority of the

attorney to act should be made to appear when he attests the libel or files it; it is enough if he establishes such authority when it is called in question. *Martin v. Walker*, 579.

2. A mere general employment as proctor or attorney at law to prosecute a demand in a Court of Admiralty, is not sufficient to authorize the party employed to verify a libel as attorney in fact of the libellant. *Ib.*

WAIVER.

1. The libellant entered an irregular default against respondent, and moved the cause on for hearing on a reference to a commissioner. The respondent appeared, took no objection, but consented to adjournments.

Held, 1. That his appearance, &c., before the referee, constituted a voluntary consent on his part to waive the irregularities committed, and to submit the case to the determination of the commissioner.

2. That the Court had power, however, to set aside the proceedings, and would do so, on terms, inasmuch as it was necessary to do so in order to enable the respondent to have the benefit of his real defence. *Gaines v. Travis*, 297.

2. A defective execution of a stipulation will be deemed waived unless excepted to before the close of the term next after the opposite party has notice of the defect. *The Infanta*, 327.
3. This rule is strictly observed in the case of stipulations given in behalf of seamen. *Ib.*

WHALING VOYAGE.

ACCOUNT, 1, 2, 3. SHIPPING ARTICLES, 3, 4, 5.

WITNESS.

1. In collision cases, the Court will attach a greater weight to the testimony of witnesses to facts which occurred within their own knowledge, on board their own vessel, than to any opinions or judgments formed by those upon one vessel respecting the management of the other. *The Governor*, 108.
2. The testimony of witnesses may be taken on a commission sent abroad, whose names are not inserted in it, on satisfactory proof furnished after its return that their names or materiality were unknown when the commission was sued out or transmitted. *The Infanta*, 263.
3. The rule more recently introduced into the English practice, and adopted in many of the State courts of the United States, which prohibits the impeaching of a witness by proving declarations of his contradictory to his testimony, unless he has been previously questioned in respect to such

declarations, and afforded the opportunity to explain them,—disapproved. *Howland v. Conway*, 281.

4. The practice formerly prevailing in this Court and in the Circuit Court, allowing the impeachment of a witness by proof declarations made by him out of Court, contradictory to his testimony, without requiring that he should be first examined with respect to them,—commended. *Ib.*
5. A female offered as a witness and objected to, upon the ground that she is the wife of the party calling her, cannot be examined to disprove the marriage when there is sufficient evidence *aliunde* before the Court to raise a presumption of marriage. *Rose v. Niles*, 411.

EVIDENCE, 1, 3.

